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Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit denying habeas corpus relief is reported at 388 F.3d 1159, and reprinted at Pet.App. 1a-61a. The Ninth Circuit's unpublished order denying Petitioner's timely petition for rehearing and reconsideration en banc is reprinted at Pet.App. 170a-171a.

STATEMENT OF JURISDICTION

The Ninth Circuit's order denying rehearing en banc was issued on March 1, 2005. In an order entered on May 18, 2005, Justice O'Connor extended Morales's time for filing a petition for a writ of certiorari until June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishment inflicted."

This case also involves provisions of the federal habeas statute, 28 U.S.C. §§ 2253-2254, and Part 190 of the California Penal Code, which are reprinted at Pet.App. 172a-183a.

STATEMENT

A. Background

On January 9, 1981, the partially clothed body of seventeen-year-old Terri Winchell was found in a vineyard in San Joaquin County, California. She had been beaten about the head and stabbed four times in the chest. Ricky Ortega, then nineteen, and his cousin, Petitioner Michael Morales, then twenty-one, were arrested and charged with murder and rape. With respect to the alleged murder, they were also charged with the special circumstances of torture and lying in wait. Ortega and Morales were tried separately. Both were convicted of first-degree murder with special circumstances. Only Morales was sentenced to death.

At Morales's trial, the prosecution presented evidence that Winchell's murder resulted from a bisexual love triangle among Winchell, Ortega, and Randy Blythe, who was

Winchell's boyfriend but also Ortega's homosexual lover. According to the prosecution, Ortega decided to kill Winchell out of jealousy and because he was angered by Winchell's public identification of Ortega, who also had a girlfriend, as a homosexual. The prosecution did not suggest a motive for Morales, who had never met Winchell before the day of the murder, other than a desire to assist his cousin.

Morales had an unremarkable criminal history prior to his arrest in this case, with no assaults, sexual assaults, or weapons violations. Estranged from his parents at age fifteen, Morales lived on the streets and was a chronic abuser of PCP. Court of Appeals Excerpt of Record ("ER") 77, Ex. V; ER 126, Ex. 11. He had consumed a bottle of fortified wine shortly before the murder, RT 2054, 2302, and had ingested PCP regularly in the preceding weeks. RT 2089; *see* ER 126, Ex. 11; ER 77, Ex. V.

B. Evidence at Trial

Morales was tried before a jury in early 1983. During the first phase of the trial, the jury heard evidence relevant to the charges and special circumstance allegations. The verdict of first degree murder aggravated by the special circumstances of torture and lying in wait triggered a separate penalty phase at the conclusion of which the jury imposed the death penalty rather than sentence Morales to life in prison without the possibility of parole.

Testimony concerning motive and chronology. The prosecution presented its account of the plot to murder Terri Winchell through testimony of various persons known to Morales, his cousin Ortega, and the victim. Blythe testified that he had maintained both a homosexual relationship with Ortega and a heterosexual relationship with Winchell. RT 1996-97, 2014-15. Glenda Chavez, a friend of Winchell's, testified that Winchell had told people in her social circle that Ortega was gay. Chavez also recounted Ortega's statements that he was going to pay Winchell back for spreading this gossip. *Id.* at 1709-10. Ortega's girlfriend, Christina Salaices, testified that five months before the murder, Ortega told her that he intended to kill Blythe, and Winchell too if she was with him, and would enlist Morales's assistance with the killing. *Id.* at 1909-10.

Raquel Cardenas, Morales's girlfriend, testified that on the afternoon of January 8, 1981, the date of the murder, Morales had told her "he was gonna do Rick a favor," that he "was gonna hurt this girl . . . strangle her . . . He was gonna use his belt . . . He was gonna put it around her neck." *Id.* at 2051-52.

Patricia Flores, who shared an apartment with Morales, testified that Ortega arrived at the apartment in the early evening, that Morales drank a bottle of fortified wine, and that Morales and Ortega left the apartment together. *Id.* at 2208-10, 2230, 2302.

Winchell's mother testified that the victim received a telephone call from Ortega early that night. Winchell's friend Chavez further testified that Winchell telephoned her twice that evening, first to say that she was going to meet Ortega at a shopping mall to help him pick out a gift, and later to say that she was going to pick up dinner at a location near the mall. *Id.* at 1699, 1701, 1722-24, 1733-34.

Cardenas and Flores testified that when Morales and Ortega returned to the apartment, about an hour after their departure. *Id.* at 2055-56, 2210. Cardenas also said that she saw Morales carrying a purse and a picture ID of Winchell, and that Morales's hands appeared to have blood on them. *Id.* at 2055-56. Flores stated that she later saw next to the sink both her hammer (which she claimed to have looked for during Morales's earlier absence) and a kitchen knife. *Id.* at 2209-12.

Shortly after Ortega and Morales returned to Flores's apartment, Ortega drove Morales and Cardenas to a store to buy wine and beer. Ortega then took Morales back to Flores's apartment and drove Cardenas home. *Id.* at 2083-85. Both Cardenas and Flores testified that they saw a spot of blood in Ortega's car. *Id.* at 2088, 2249-50.

When Winchell did not return home, her mother reported her missing. *Id.* at 1726-27. The next evening, police officers investigating the disappearance "made contact" with Ortega at the police station. *Id.* at 1741. Ortega led them to Winchell's body in a vineyard approximately twenty miles from Flores's apartment. *Id.* at 1742, 1744.

Physical evidence. The recovery of Winchell's body yielded substantial physical evidence. That evidence, however, shed no light on what role Morales played in Winchell's murder and, indeed, tended to exonerate Morales of rape. A postmortem examination revealed that Winchell died from shock and hemorrhage due to multiple stab wounds, and blunt force injuries to the face and head caused by an instrument consistent with a hammer. *Id.* at 1786, 1801. The examination identified twenty-three injuries to Winchell's face and head, four stab wounds to her left chest or heart, and defensive wounds to her hands and forearms. *Id.* at 1780-82, 1798. The coroner testified that the blows to Winchell's head would have resulted in a loss of consciousness "fairly soon" after they were struck and death "shortly thereafter." *Id.* at 1847, 1850 (Winchell "died pretty fast").

The postmortem examination revealed no trauma to Winchell's neck, external or internal, *id.* at 1831-34, or to Winchell's genitalia, *id.* at 1831. Although semen was found in Winchell, a phoscogluconiutate (PGM) test revealed factors consistent only with Winchell's profile. The prosecution's expert stated that he could "make no conclusion" as to whether Morales was the source of the semen due to the absence of a factor present in Morales's blood. *Id.* at 2136 (test findings "not consistent" with attribution of the semen to Morales). An examination of Winchell's body for Morales's pubic hairs also came up negative. *Id.* at 2170.

The police investigation produced evidence linking Ortega's car and person to the crime. Blood stains consistent with Winchell's blood type and PGM subtype were found in the car, and Winchell's fingerprints were lifted from a soft drink can found in it. *Id.* at 1899, 1937-38, 2066, 2131, 2141. The police also found two front seat floor mats from Ortega's car in a dumpster near Flores's apartment; these revealed bloodstains consistent with Winchell's type and subtype. *Id.* at 1912-14, 2140, 2389. The same was true of Ortega's pants. *Id.* at 2146, 2143, 2131.

Physical evidence found at Flores's apartment evidence included a broken belt found between the mattress and box spring of a bed. The belt had blood on it consistent with

Winchell's blood. *Id.* at 1961, 2150. The prosecution also introduced a hammer found in the refrigerator bearing a minute quantity of human blood, too small to type, *id.* at 1956, 2138, three knives, none with blood on them, *id.* at 2190, and Winchell's purse, *id.* at 1960, 1710.

Extrajudicial statements attributed to Morales. As the federal district court later observed, the physical evidence "on its own [was] insufficient to prove [Morales] murdered Terri Winchell." ER 149 at 68. For this reason, the prosecution's case, and especially its attempt to prove the torture and lying-in-wait special circumstances, relied heavily on incriminating extrajudicial statements that Morales purportedly made following the murder.

The prosecution's main witness regarding Morales's purported confessional statements was jailhouse informant Bruce Samuelson, a recidivist felon facing six new felony charges as well as unresolved parole violations. According to Samuelson, he ended up housed near Morales in a high-security cell block because, given his reputation as a snitch, he feared placement in the general prison population. Samuelson informed prosecutors that, on the eve of his highly publicized trial, Morales suddenly decided to confide in Samuelson (a prisoner renown for being a snitch) a shockingly lurid and remorseless confession in a conversation held across a crowded cellblock. *See* RT 2332-40, 2364-67.

Presented with this witness whose testimony would serendipitously fill important holes in its case, the prosecution cut Samuelson a deal whereby he would get a recommendation of leniency on his six pending felony charges in exchange for testimony. ER 77, Ex. F. The prosecution then decided to verify Samuelson's inherently implausible story by giving him a pre-trial polygraph test. The test results showed clear signs of deception regarding Samuelson's claim to have received information from Morales. ER 126, Ex. 6.

Prosecutors nevertheless told defense counsel that Samuelson had passed the polygraph test. ER 126, Ex. 4. Samuelson then took the stand and told the jury his graphic tale, to wit that Morales confessed that: (1) he "had prepared" for the arrival of Ortega and Winchell on the day of the murder,

arming himself with "a small thin belt, a kitchen knife and a hammer" before he was picked up, *id.* at 2336; (2) he and Ortega had driven Winchell away from Stockton, traveling through town rather than on the freeway to "the outskirts where they were out of earshot or hearing distance from anybody else" in order "[t]o avoid detection from any outside source," *id.* at 2336-37; (3) after attacking Winchell in the car, he had taken "the body out, dragged it face down across the pavement, pulling by the feet and drug her to a field . . . ," *id.* at 2338; and (4) after dragging Winchell into the field, he had decided "there was no use wasting a good piece of . . . ass," and had raped Winchell before stabbing her to death, *id.* at 2338-39. Samuelson also testified that Morales had solicited him to murder Flores and Cardenas to prevent them from testifying against him. *Id.* at 2341.

Samuelson's testimony, in particular his claims as to what Morales said happened in the car, was essential to the jury's finding on the lying-in-wait special circumstance and, specifically, that Morales's actions met the required elements of concealing his purpose, attacking from a position of advantage, and catching Winchell unawares.[1] Yet as is now effectively uncontested, Samuelson fabricated Morales's confession. Under the pressure of Morales's habeas petition, the California Attorney General's office interviewed Samuelson concerning the circumstances surrounding Morales's extraordinary confession. Samuelson told investigators that Morales had been willing to make damning statements to Samuelson in conversations conducted between cells located diagonally across from each other on a crowded cellblock because he and Morales discussed the case only in Spanish. ER 126, Ex. 1 at 24-25 ("[I]f we weren't talking about his case we would speak in English. And the rest of the time we would talk in Spanish. . . ."). There was only one problem with Samuelson's newly embellished account. Unbeknownst to Samuelson (or the state Attorney General's office for that

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[1] The prosecution fully appreciated Samuelson's central importance to its case. A note in the prosecution file for Samuelson identified him as "a key witness in prov[ing] Michael Morales 187 w/ specials". ER 77, Ex. A.

matter), Morales grew up in an English-speaking household and, as is uncontested, does not speak Spanish.[2] In short, Samuelson trapped himself in his own web of lies, conclusively discrediting his critical testimony at trial.

In addition to Samuelson's false testimony, only one other witness, Morales's girlfriend Raquel Cardenas, gave testimony even arguably supportive of the lying-in-wait special circumstance. She stated that after Morales returned home with Ortega on January 8, Morales told her "how he killed [Winchell]." *Id.* at 2058. "He said he tried to strangle her [] with a belt and it broke so he hit her over the head . . . [w]ith a hammer." Then "[s]he knocked out." "[H]e just kept hitting her, then he dragged her out of the car." "He left her in the vineyards." *Id.* at 2059. Winchell "was screaming for Rick." "Just told Rick to make him stop." *Id.* at 2060-61. "[Rick] was driving." *Id.* at 2060. "[Morales] hit her with the hammer to knock her out." *Id.* at 2060.

Standing alone, this testimony clearly could not support a lying-in-wait finding. (Although the California Supreme Court suggested that Winchell's reported cries for help indicated that she was taken unawares (Pet.App. 128a), it did not address the natural impulse of attack victims to cry out for help whether surprised or not.) In any event, Cardenas recanted her testimony and, without contradiction by the State, explained that during the habeas proceedings the police had strong-armed her into concocting Morales's confession. Specifically, after Cardenas initially told the police she had no information about the murder, the police arrested her for accessory to murder, placed her in juvenile hall, subjected her to late night interrogations, and threatened that she could easily be "put away for a long time" if she did not tell them "what they wanted to hear." After police interrogators recounted to her the details of the crime as they saw it, Cardenas acquiesced to their demands in exchange for immunity. ER 126, Ex. 11.

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[2] Affidavits from Morales's family members and acquaintances were introduced during the district court phase of the federal habeas proceeding demonstrating that Morales neither speaks nor understands Spanish. ER 138, Exs. A-D.

In sum, in light of the invalidation of the torture special circumstance, Morales remains death-penalty eligible only by dint of testimony on the lying-in-wait special circumstance that is known to be false, arguably bolstered by testimony that was coerced and recanted.

C. Conviction and Sentence

The jury convicted Morales of first degree murder, conspiracy to commit murder, and rape, and found that the special circumstances of torture and lying in wait applied. *See* Cal. Penal Code §§ 190.2(a)(15), (a)(18) (Matthew Bender 1983) (Pet.App. 178a-179a).[3] Under California's sentencing scheme, a finding that special circumstances apply triggers a separate capital sentencing proceeding, during which the jury chose between punishments of death or life without the possibility of parole. *Id.* §§ 190, 190.1, 190.2(a). (Pet.App. 177a-179a.)

The jury instructions at the sentencing stage underscored the importance of the special circumstance findings. In "determining which penalty to be imposed upon defendant," jurors were directed to "consider, take into account and be guided by" factors that included "the circumstances of the crime of which defendant was convicted in the present proceeding *and the existence of any special circumstances found to be true*." RT 3141 (emphasis supplied). Jurors were further instructed that the special circumstances found in the guilt phase were to be weighed in the balance against any mitigating circumstances, RT 3142-43, and that a "single circumstance . . . may be sufficient standing alone to outweigh those opposed to it and to support a decision as to punishment," RT 3145.

D. Review by the California Supreme Court

On direct review, a divided California Supreme Court affirmed Morales's conviction and sentence. Pet.App. 95a-169a. In arguing that the sentence of death had been imposed unlawfully, Morales attacked both special circumstance findings.

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[3] The prosecution initially alleged three additional special circumstances — robbery-murder, rape-murder, and heinous and cruel murder (*id.* §§ 190.2(a)(17)(i), (a)(17)(iii), (a)(14) (Pet.App. F at 178a-179a)). However, those special circumstance allegations were dismissed before trial.

Morales argued that the jury instruction on torture as a special circumstance omitted a constitutionally necessary intent element. The California Supreme Court acknowledged that the instruction was "flawed" by its failure "to explain that proof of an intent to inflict extreme pain was required." Pet.App. 132a. But the court nevertheless found that the torture special circumstance afforded a valid basis for Morales's death sentence, since the jury had made an "implied finding of torture murder" in the course of determining that Morales had committed first-degree murder. This implied finding, according to the court, "necessarily would include a finding of intent to cause extreme pain." *Id.* at 134a.[4] The court acknowledged that the evidence concerning Morales's intent to torture was "somewhat ambiguous," but found that the "premeditated and prolonged" nature of the assault and Morales's purported statements to Cardenas that he intended to "'hurt' and strangle a girl, [were] sufficient to sustain the jury's implied finding of intent to inflict extreme pain." *Id.* at 130a.

The California Supreme Court also rejected Morales's challenge to the lying-in-wait finding. The court upheld the jury instruction on lying in wait, rejecting Morales's contention that the instruction improperly permitted concealment of intent to substitute for physical concealment. The court held that lying in wait requires elements of "waiting, watching and concealment," and that concealment "may manifest itself either by an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer." Pet.App. 120a; *see also id.* at 124a ("disapproving" court's earlier "insistence on some period of actual physical concealment" in *Richards v. Superior Court*, 194 Cal. Rptr. 120, 125 (1983)). The court also found adequate factual support for the lying-in-wait finding, relying mainly on Samuelson's testimony to satisfy the redefined standard. Pet.App. 127a ("Defendant, after watching and waiting until the car and its occupants reached the outskirts of town,

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[4] This assessment by the state Supreme Court was at odds with the trial judge's determination, upon conclusion of the prosecution's case, that the evidence of Morales's intent to inflict pain was insufficient to sustain a charge of first-degree torture murder as a matter of law. RT 2708, 2712.

suddenly and without prior warning attacked his victim from behind with the intent to kill her.").

Justice Mosk dissented from the court's affirmance of Morales's sentence, arguing that both special circumstances findings in the case were invalid. Pet.App. 153a-159a. With respect to torture, Justice Mosk concurred in the majority's assessment that the element of intent had been improperly omitted from the jury instructions but rejected the majority's conclusion that the jury would have found intent if properly instructed. *Id.* at 157a. With respect to lying in wait, Justice Mosk rejected the State's contention that "concealment" could "mean[ ] anything other than actual *physical* concealment" and opined that the majority's open-ended view, which permits the imposition of death sentences based on concealment of intent, violates the Eighth Amendment. *Id.* at 154a-156a.[5]

E. Habeas Proceedings Before the District Court

In July 1992, Morales, represented by newly-appointed counsel, filed a petition for a writ of habeas corpus in United States District Court. After threshold questions concerning exhaustion of state remedies were resolved in Morales's favor,[6] the district court reached the merits of Morales's federal habeas claims and rejected all of them.

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[5] Justice Broussard also dissented, finding that Morales's Sixth Amendment right to a jury pool reflecting a fair cross-section of the community had been violated by Ventura County jury selection procedures. Pet.App. 160a-169a. Justice Broussard did not reach Morales's objections to the special circumstances instructions.

[6] The district court initially rejected many of Morales's claims for failure to exhaust state remedies. Morales therefore returned to state court to exhaust his state habeas remedy, but the California Supreme Court summarily denied his petition "on the merits and as untimely." ER F & G, *In re Michael Angelo Morales On Habeas Corpus*, Nos. S030276, S032386 (Cal. July 28, 1993). Justice Mosk again dissented, stating that an order to show cause should have issued. *Id.*; ER F.

Having exhausted state remedies, Morales returned to district court to resume pursuit of his federal habeas remedy. The district court determined that the California Supreme Court's finding of untimeliness precluded federal habeas review. ER 149 at 21. On appeal, the Ninth Circuit reversed this procedural default determination and remanded for consideration of the merits, ruling that California's timeliness standards were too vague to provide an adequate and independent state-law basis for dismissal. *Morales v. Calderon*, 85 F.3d 1387, 1388, 1390-91 (9th Cir. 1996).

Morales's federal petition included a challenge to the prosecution's use of jailhouse informant Bruce Samuelson, whose testimony was critical to the lying-in-wait special circumstance finding in this case. Morales argued that California prosecutors had presented testimony that they should have known to be false in violation of *Napue v. Illinois*. *See* ER 77 at 31-55; ER C at 77-78.

Morales's due process claims pertaining to the prosecution's misuse of Samuelson's testimony were strongly supported by information in the prosecution's files at the time of the trial, which indicated that Samuelson was lying. *See supra* at 5-6. Any doubt that Samuelson had fabricated Morales's supposed jailhouse confession was removed when the California prosecutors disclosed the transcript of the post-trial interview in which Samuelson claimed to have conversed with Morales in Spanish to overcome Morales's concerns about eavesdropping by jailhouse informants. The district court rejected Morales's claims respecting Samuelson's testimony. ER 149 at 29-34. It also rejected Morales's constitutional challenges to the torture and lying-in-wait special circumstance instructions. Pet.App. 62a-94a (concluding that lying-in-wait special circumstance is not unconstitutionally broad and that the California Supreme Court correctly identified an implied finding of intent to torture).

F. The Ninth Circuit Ruling

The Ninth Circuit affirmed the district court's denial of the petition. As a threshold matter, the court of appeals addressed its own jurisdiction under the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") requirement that appellate courts in federal habeas proceedings only reach the merits of issues for which a certificate of appealability has issued.[7] Finding the district court's case-wide certificate inadequate under the AEDPA, the court of appeals undertook

[7] Morales filed his federal habeas petition before the effective date of the AEDPA. The merits of his claims are therefore governed by pre-AEDPA standards. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). However, the Ninth Circuit has held that AEDPA certification procedures apply to any habeas appeal taken after the AEDPA's effective date. *Mayfield v. Woodford*, 270 F.3d 915, 921 & n.5 (9th Cir. 2001) (en banc).

its own review of Morales's issues to identify those with respect to which Morales had made "a 'substantial showing of denial of a constitutional right,'" Pet.App. 12a (quoting 28 U.S.C. § 2253(c)(2)). The court listed five issues that, in its view, warranted certification, but provided no explanation for its refusal to exercise appellate jurisdiction over Morales's remaining claims. *Id.* at 13a-14a.

As relevant to this petition, the court of appeals refused without explanation to accept jurisdiction over Morales's *Napue* claim that the prosecution unconstitutionally elicited Samuelson's testimony even though it should have known that testimony was false.

Morales's challenges to the torture and lying-in-wait special circumstance findings, unlike his claims pertaining to Samuelson's false testimony, were certified for appellate review. The Ninth Circuit sustained Morales's constitutional challenge to the torture finding. The court ruled that the jury instruction permitting a finding of torture as a special circumstance without a determination of intent violated the Eighth Amendment, since distinctions among defendants based wholly on the victim's pain might "'have nothing to do with the mental state or culpability of the defendant.'" Pet.App. 16a (quoting *Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994)). The Ninth Circuit rejected the California Supreme Court's view that the jury necessarily found that Morales intended to inflict pain, either as an implied element of its first degree murder verdict or as a logical corollary of its determination that Winchell experienced severe pain. *See id.* at 21a.

The Ninth Circuit rejected Morales's Eighth Amendment challenge to the lying-in-wait finding, although the panel divided on this point. The panel majority recognized that the California Supreme Court "has interpreted [lying in wait] liberally, to embrace not just traditional ambush, but murder accomplished by surprising the victim." Pet.App. 30a. But it concluded that the lying-in-wait standard was still sufficient to differentiate a class of "murders by ambush" from a class of "murders without ambush," and that this level of differentiation satisfied the Eighth Amendment requirement

that the State's sentencing regime "adequately narrow[ ] the class of murderers subject to the death penalty." *Id.* at 30a-31a, 36a.

Judge McKeown disagreed. Although she deferred to circuit precedent that the lying-in-wait special circumstance is not unconstitutionally vague under the Fifth Amendment, Pet.App. 52a, she disputed the majority's view that the lying-in-wait standard narrows the class of death-eligible defendants to the extent required by the Eighth Amendment. Finding the California Supreme Court's interpretation of the lying-in-wait standard "so porous that it fails to strain out non-death eligible murders in a constitutionally meaningful way," *id.*, she concluded that neither the lying-in-wait finding nor the torture finding provided a constitutionally valid basis for Morales's death sentence, and dissented from the denial of Morales's petition for relief with respect to death eligibility.

Having determined that only one of the two special circumstances findings against Morales withstood constitutional scrutiny, the panel majority addressed the implications of the constitutional error. The court observed that if the California Supreme Court had recognized the error, it might have avoided ordering that Morales be resentenced if it had been able to find that the error was harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18 (1967), or if it had conducted an independent appellate "reweighing" of aggravating and mitigating circumstances already found by a jury to exist, *see Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). Pet.App. 21a.[8] Because the California Supreme Court had not engaged in a proper harmless error analysis (relying instead on an unfounded "assertion" that the jury must have found intent to torture), or reweighed aggravating and mitigating circumstances, *id.* at 21a-22a, the court of appeals performed its own "independent harmless error analysis" of

[8] In setting forth its harmless error and reweighing analysis, the court of appeals assumed "*arguendo*" that "California is a weighing state" in which aggravating factors that establish death eligibility are also factored into the sentencing decision. Pet.App. 20a. This passage was apparently drafted before the Ninth Circuit ruled that California is a weighing State. *Sanders v. Woodford*, 373 F.3d 1054, 1060-62 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1700 (2005) (discussed in Part IV, *infra*).

the unconstitutional torture instruction. The court of appeals did not ask whether the error was "harmless beyond a reasonable doubt" – the question that the California Supreme Court would have asked under *Chapman*. Applying instead the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the court asked "'whether, in light of the record as a whole' the error had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 23a (quoting *Brecht*, 507 U.S. at 638). Based on its review, the court of appeals concluded that there was "overwhelming" evidence of Morales's guilt in "an entirely gratuitous and terribly vicious murder," and held that it was "mere speculation" to suggest that elimination of the unconstitutional torture finding would have "mattered to the jury." *Id.* at 24a. Accordingly, the court of appeals affirmed the district court's denial of habeas relief.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Violated Its Obligations Under Section 2254 And *Miller-El* When It Summarily Refused To Certify Morales's Challenge To The State's Use Of Samuelson's False Testimony, Even Though The Federal Courts Of Appeals Disagree As To The Standard Governing The Merits Of That Claim, And Morales Made A "Substantial Showing" That His Constitutional Rights Were Violated Under The Law Of Two Circuits.

A. Morales Met the Requirements for a Certificate of Appealability.

To merit a certificate of appealability ("COA"), Morales was required to show only that that reasonable jurists "could disagree with the [lower] court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S.473, 484 (2000)); *see Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000); *see also Banks v. Dretke*, 540 U.S. 668, 705 (2004). As this Court stated in *Miller-El*, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner

will not prevail." 537 U.S. at 338. In short, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342.[9]

The Ninth Circuit's disposition of Morales's *Napue* claim with respect to Samuelson's perjured testimony cannot be reconciled with *Miller-El*. Here, the validity of Morales's *Napue* claim turns on an issue over which the federal court of appeals are deeply divided - namely, whether the prosecution is prohibited from introducing evidence only if it "*knows*" the evidence is false or whether the prohibition extends to evidence the prosecution has "*reason to know*" is false. Morales presented ample evidence to show that the prosecution should have known Samuelson was lying when he claimed Morales confessed to him. The Ninth Circuit nonetheless denied Morales a COA on this issue, apparently because it applied the higher "actual knowledge" standard for *Napue* claims.[10] By definition, this deprived Morales of his appellate rights under *Miller-El*. As a matter of logic, a claim that implicates a circuit split cannot fail to raise a "debatable" issue.

B. Morales Arguably Made a "Substantial Showing" of *Napue* Error.

Morales argued that the State committed *Napue* error when it allowed Samuelson to testify even though it should have known that he was lying and that he would perjure himself if allowed to take the stand. The negative result of Samuelson's polygraph test, combined with his promise to give the prosecution what it needed to convict Morales if it would first cut a deal with him, and the dubious circumstances of Morales's supposed confession to a known snitch in a noisy and crowded cellblock, would have put a reasonable prosecutor on notice that his testimony was likely to be false. Indeed, Samuelson's testimony turned out to be total

[9] This Court has jurisdiction on a writ of certiorari to review the denial of an application for a COA by a circuit court. *Hohn v. United States*, 524 U.S. 236, 238-39 (1998).

[10] Although the Court of Appeals gave no reason for denying a certificate of appealability on Morales's *Napue* challenge to the use of Samuelson's testimony, it applied the actual knowledge standard to its rejection of Morales's *Napue* claim regarding Cardenas's testimony. Pet.App. 39a-42a.

fabrication, as the California Attorney General's office learned when it interviewed him after trial. (*See supra*, pp. 6-7.)

This Court has established that the Due Process Clause of the Fourteenth Amendment is violated if a prosecutor *knowingly* allows a state witness to give false testimony or lets such testimony go uncorrected. *E.g., Napue*, 360 U.S. at 269; *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam). As it recently confirmed, "the prosecution's 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" *Banks v. Dretke*, 540 U.S. at 694 (quoting *Giglio v. United States*, 405 U.S. 150, 153 (1972)). Indeed, this type of prosecutorial error is so grave that "reversal is 'virtually automatic'" when the government *knowingly* permits the introduction of false testimony, *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975) (citing *Napue*, 360 U.S. at 269)); *accord, Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114 (9th Cir. 2001) (Trott, J.).

This Court has also suggested that the Due Process Clause is violated when the prosecution "*should have known*" that a witness will give, or has given, false testimony, and fails to prevent or correct it. *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). It has, however, yet to delineate the parameters of this alternative standard. *See Drake v. Portuondo*, 321 F.3d 338, 344-45 (2d Cir. 2003).

A number of circuits have held that *Napue* error exists *only* when the prosecution *knowingly* permits false testimony to go uncorrected. *E.g., United States v. Tanner*, 61 F.3d 231 (4th Cir. 1995);[11] *Carter v. Johnson*, 131 F.3d 452 (5th Cir. 1997); *Reddick v. Haws*, 120 F.3d 714, 718 (7th Cir. 1997); *Jacobs v. Singletary*, 952 F.2d 1282, 1287 & n.3 (11th Cir. 1992).

But at least two circuit courts of appeals – the Ninth (prior to this case) and the Second – have relied on this Court's opinions to hold that due process may be violated when the prosecution *should have known* that its witness is or was

[11] *But cf. United States v. Kelly*, 35 F.3d 929, 935-36 (4th Cir. 1994) (stating in dicta that reversible error could ensue from government's failure to act on information it "at least should have known" was false).

untruthful. In particular, the Ninth Circuit has held that "*Napue* . . . requires a prosecutor to act when *put on notice* of the real possibility of false testimony." *Bowie*, 243 F.3d at 1118 (emphasis added). "This duty is not discharged . . . by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts." *Id.* (footnote omitted).

The Second Circuit has likewise held that due process may require reversal of a conviction when the prosecution "should have known" that its witness has testified falsely or is likely to do so, and fails to correct the problem. *Wallach*, 935 F.2d at 456-58 (reversing and remanding for new trial because government should have been aware of a material witness's perjury and the perjured testimony was "probably" responsible for the guilty verdict); *Sanders v. Sullivan*, 863 F.2d 218, 224-25 (2d Cir. 1988) (adopting Justice Douglas's dissenting opinion in *Durley v. Mayo* to hold that State's failure to cure a conviction after "credible recantation by an important and principal witness [] exhibits sufficient state action to constitute a due process violation") (citing *Durley v. Mayo*, 351 U.S. 277, 290-91 (1956) (Douglas, J., dissenting)); *see Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003) (observing, in the context of the state's knowing elicitation of perjury, that "clearly established Federal law, as determined by the Supreme Court of the United States . . . . [requires] us [to] ask [*inter alia*] . . . whether [the testimony of the state witness] either was or *should have been known* to the prosecution to be false") (emphasis added).[12]

In light of these precedents, the panel in this case committed a double-barreled error. To begin with, the panel ignored its own circuit's proper standard for assessing *Napue* claims. But more fundamentally, it denied a certificate of appealability, without a word of explanation, on a claim over

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[12] *But cf. Drake*, 321 F.3d at 345 n.2 (observing that *Sanders* does not apply to post-AEDPA cases, because AEDPA "permits us to rely only on clearly established Supreme Court precedent"); *see also id.* at 345 (declining "to draw the contours of the phrase 'should have known' [until] we are presented with a case that requires us to do so").

which the courts of appeals are divided. Having rejected the "should have known" *Napue* standard in favor of the more stringent actual knowledge standard, the panel could only have believed that the Samuelson claim was meritless. This assessment of the merits was error. 537 U.S. at 336-37. Had it made the threshold inquiry required by *Miller-El*, and asked whether reasonable jurists could disagree about the resolution of the claim, the panel would have had to conclude, given the split among the circuits, that Morales's claim was at least debatable.

This debate is by no means academic. Samuelson's perjured testimony was needed to make Morales death-penalty eligible, as it is essential to the lying-in-wait finding, the sole special circumstance remaining in the case. The Ninth Circuit decision here stands for the proposition that a federal court of appeals, assessing in the first instance whether a death-sentence dispositive issue qualifies for a COA, may summarily deny the certificate in the face of a circuit split on the standard to be applied. *Miller-El* permits no such thing and review is necessary here to vindicate its reach.

II. California's Lying-In-Wait Special Circumstance Violates The Eighth Amendment Because It Does Not Genuinely Narrow The Class Of Persons Eligible For The Death Penalty.

The Eighth Amendment requires that a state's capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sanction on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *accord*, *Arave v. Creech*, 507 U.S. 463, 474 (1993); *see Maynard v. Cartwright*, 486 U.S. 356, 361-65 (1988) (death penalty special circumstance is void for vagueness under Eighth Amendment if it fails adequately to inform juries what they must do); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (death penalty special circumstance must provide a "'"meaningful basis for distinguishing the *few* cases in which [the death penalty] is imposed from the *many* cases in which it is not."'") (emphasis added) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

California's lying-in-wait special circumstance fails "genuinely [to] narrow the class of persons eligible for the death penalty" because it applies to virtually all defendants found guilty of premeditated or first degree murder. "Whereas the Constitution demands a funnel narrowing the pool of defendants eligible for the death penalty, California gives us a bucket." Pet.App. 54a (McKeown, J., concurring in part and dissenting in part). Indeed, that was the goal of the 1978 initiative enhancing the state's death penalty statute. Sponsors urged California voters to back the measure because "the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." State of California, Voter's Pamphlet 34 (1978). Proposition 7 passed, adding a number of special circumstances, including lying in wait, to California's roster of death penalty triggers.[13] The California Supreme Court helped to ensure that the death penalty would, or could, "apply to every murderer" when it articulated the elements of the lying-in-wait special circumstance in Petitioner's case. Pet.App. 126a.

Four states use lying in wait (or ambush) as a factor triggering death penalty eligibility. Three of them - Indiana, Colorado, and Montana - follow the traditional understanding of this circumstance by requiring that the defendant have *physically concealed* himself from the victim. *See Washington v. State*, 808 N.E.2d 617, 626-28 (Ind. 2004) (lying in wait requires watching and waiting from a concealed position, and use of physical concealment as a direct means to attack or gain control of the victim); *People v. Dunlap*, 975 P.2d 723, 751 (Colo. 1999) (holding trial court need not have defined the term lying in

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[13] As originally drafted, the language used to describe the lying-in-wait special circumstance differed slightly from that used to describe the provision for first degree murder. The latter was defined as commission of murder "*by means of*" lying in wait, and the former as murder "*while* lying in wait." *See Morales*, 770 P.2d at 261 (quoting the statutes) (emphasis added). The *Morales* court declined to decide whether the difference in wording was meaningful. *Id.* In any event, the difference was eliminated in 2000, when the lying-in-wait special circumstance provision was amended to comport with the first degree murder provision. Both now define lying in wait as murder "*by means of lying in wait.*" Cal. Pen. Code § 190.2 (a)(15) (emphasis added).

wait because it "now has a common sense, widely understood meaning," namely, that "the killer conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise"); *State v. Dawson*, 761 P.2d 352, 360 (Mont. 1988). The Indiana and Montana Supreme Courts have observed that their employment of lying in wai" as an aggravating circumstance passes constitutional muster precisely because it is narrowly defined. *Davis v. State*, 477 N.E.2d 889, 896 (Ind. 1985); *Fitzpatrick v. State*, 638 P.2d 1002, 1015-16 (Mont. 1981).

Only California has elected to eschew this requirement in the years following the enactment of Proposition 7.[14] In Petitioner's case, the California Supreme Court declared that: "physical concealment from, or an actual ambush of, the victim is *not* a necessary element of the offense of lying-in-wait murder." Pet.App. 121a (emphasis added). The result is a death penalty filter that has been criticized by judges and scholars alike as both overbroad and vague under the Eighth Amendment. *Morales v. Woodford*, Pet.App. 54a (McKeown, J., concurring in part and dissenting in part) ("The California Supreme Court's formulation of the [lying-in-wait] limiting construction is so porous that it fails to strain out non-death eligible murders in a constitutionally meaningful way."); *see* Pet.App. 156a (Mosk, J., concurring in part and dissenting in part) (California's lying-in-wait special circumstance is "so broad in scope as to embrace virtually all intentional killings."); *People v. Webster*, 814 P.2d 1273, 1306 (Cal. 1991) (Broussard, J., concurring in part and dissenting in part) ("*Morales* made no attempt to show that a murder by lying in wait is more heinous than an 'ordinary' murder, or that the difference, if any, is sufficient to justify the disparity in

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[14] Traditionally, California, too, interpreted lying in wait as requiring physical concealment. Indeed, Indiana uses the definition given by Justice Traynor of the California Supreme Court in his concurring opinion in *People v. Thomas*, 261 P. 2d 1, 7 (Cal. 1953): "'Lying in wait requires the elements of waiting, watching, and concealment for the purpose of taking a victim unawares.'" *Davis*, 477 N.E.2d at 896 (also quoting *Richards v. Marin County Superior Court*, 194 Cal. Rptr. 120, 124 (Cal. 1983), the case overruled by the California Supreme Court in *Morales* to the extent it included a requirement of physical concealment). *See Washington v. State*, 808 N.E.2d at 626-628 (approving *Davis*).

penalty."); *People v. Ceja*, 847 P.2d 55, 63-64 (Cal. 1993) (Kennard, J., concurring) ("I have a growing concern . . . that [our] decisions may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder."); *see also* Shatz & Rifkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1324 (1997); Osterman & Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. Rev. 1249, 1273-74 (1996).

Specifically, California defines lying in wait, for purposes of death penalty sentencing, as "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." Pet.App. 126a.[15]

These criteria do not meet the Eighth Amendment requirements. The first element, concealment of purpose, as opposed to physical concealment, is characteristic of most murders. As Justice Mosk put it, "[a]lmost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." *People v. Webster*, 814 P.2d at 1303 (Mosk, J., concurring in part and dissenting in part) (quotations and citation omitted). In any event, it is unclear why a declaration of his intent to kill would make a killer less culpable in the context of lying in wait. If a killer meets the surprise criterion, his declaration of murderous intent would not be made for the purpose of allowing his "unsuspecting victim" a chance to resist or escape.[16]

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[15] The California Supreme Court has approved the same instruction for determining first degree murder in the guilt phase of trial. *People v. Ceja*, 847 P.2d at 58-59 (citing *Morales*, 770 P.2d at 258-61); *cf. id.* at 59 n.2 (noting language distinction that has since been eliminated from the two statutes).

[16] Indeed, in *People v. Arellano*, 23 Cal. Rptr. 3d 172, 176-77 (Cal. Ct. App. 2005), the court of appeals held that a killer's repeated death threats to his victim did not foreclose application of the lying-in-wait special circumstance because the victim did not know just when he would strike.

The second element - "a period of watchful waiting," Pet.App. 123a (emphasis omitted) - is even more mercurial. *Morales v. Woodford*, Pet.App. 57a (McKeown, J., concurring in part and dissenting in part). The California Supreme Court has held that a lying-in-wait killer need not actually *watch* the victim as long as he is "alert and vigilant" while waiting. *People v. Sims*, 853 P.2d 992, 1007 (Cal. 1993). At the same time, the court has held that a killer who *falls asleep* while waiting for his victim - the antithesis of alert vigilance - also meets the second criterion. *People v. Tuthill*, 187 P.2d 16, 20-21 (Cal. 1947). The significance of the second element is also elusive. As Justice Broussard commented, "there seems no reason to punish more severely the killer who waits for his victim than the killer who hunts down the victim." *People v. Webster*, 814 P.2d at 1306 (Broussard, J., concurring in part and dissenting in part). *See id.* ("Consider, for example, the following comparison: Killer A learns that the victim will be at a certain place, goes directly there, and shoots the unsuspecting victim in the back. Killer B does the same, except that the victim is delayed, and B must wait for a substantial period for the victim to appear. Under *Morales*, B commits the special circumstance of lying in wait, but A does not. Yet would anyone claim on these facts that B deserves a far more severe punishment than A?").

The last element - a surprise attack on an unsuspecting victim from a position of advantage - adds little or nothing to the definition of lying in wait. Given the concealment of purpose element, the victim is necessarily unsuspecting and the attack invariably a surprise. *See* Pet.App. 57a (McKeown, J., concurring in part and dissenting in part) (observing that concealment and surprise are indistinguishable). As for the requirement that the killer occupy a "position of advantage," it is self-evident that a surprise attacker holds a position of advantage over an unsuspecting victim.

In sum, California's lying-in-wait special circumstance applies to most, if not all, defendants found guilty of premeditated or first degree murder. It thus fails to narrow the class of defendants sufficiently to comport with the Eighth Amendment's requirement. While the majority in *Morales v. Woodford* was able to think of a few examples that might escape

its broad criteria, Pet.App. 31a, this imaginative exercise does not suffice to show that there is a "meaningful basis for distinguishing the *few* cases in which the penalty is imposed from the *many* cases in which it is not[.]" *Id.* at 47a (McKeown, J., concurring in part and dissenting in part) (emphasis added); *Godfrey v. Georgia*, 446 U.S. at 427-28. Because the lying-in-wait special circumstance "fails adequately to inform juries what they must find to impose the death penalty," *Maynard*, 486 U.S. at 361-62, it also fails the Eighth Amendment's test for vagueness.

Here, it is undisputed that Morales was not physically concealed from his victim. He could not have been found eligible for the death penalty under a definition of lying in wait that comports with the Constitution. This Court should grant review to consider the validity of California's lying-in-wait special circumstance under the Eighth Amendment.

III. This Court Should Grant Certiorari To Resolve The Circuit Split Regarding The Proper Level Of Review To Be Applied By A Federal Court When State Courts Fail To Conduct Adequate *Chapman* Or *Clemons* Review Of Constitutional Error.

Review by this Court is needed to resolve a circuit split regarding the harmless error standard that a federal court should apply in a death penalty case when it determines that the state court failed to conduct constitutionally adequate harmless error review in the first instance.

This Court has long required "close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer v. Black*, 503 U.S. 222, 230 (1992) (citing *Zant v. Stephens*, 462 U.S. at 879, and *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982)); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Consideration of invalid aggravating factors in the capital sentencing process threatens the integrity of procedures designed to afford individualized consideration. This is especially true in a "weighing state,"

where "the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances." *Clemons*, 494 U.S. at 745.[17] In reviewing a death sentence handed down in such a state, the reviewing court cannot "assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer*, 503 U.S. at 232; *see Sochor v. Florida*, 504 U.S. 527, 532 (1992) ("invalid aggravating factor in the weighing process creates the possibility of randomness") (internal quotation marks omitted); *see also Pensinger v. California*, 502 U.S. 930, 931 (1991) (O'Connor, J., dissenting from denial of certiorari) (California jury's consideration of invalid special circumstance cannot be held harmless "based solely on the fact that the error did not alter the mix of evidence").

Here, the Ninth Circuit invalidated one of the two special circumstances supporting Morales's death sentence. Acting on the assumption that California is a weighing state the Ninth Circuit held that the California Supreme Court erred by failing either to engage in independent record analysis under *Chapman*, to determine whether the invalid torture finding influenced the sentencing decision,[18] or to perform its own weighing of the aggravating and mitigating circumstances under *Clemons*. Pet.App. 21a (holding that the California Supreme Court failed to subject the instructional error to harmless error analysis "to which deference might be appropriate."). But the Ninth Circuit neither remanded for entry of an order that would allow the state court to undertake

[17] In a non-weighing state, by contrast, aggravating factors determine eligibility for the death penalty, but have no special function in the sentencing phase, in which the fact finder considers all circumstances from both the guilt and the sentencing phases of the trial. *Stringer*, 503 U.S. at 229-30.

[18] The California Supreme Court cited *Chapman* and purported to find that the erroneous torture instruction was harmless based on an unfounded assertion that the jury impliedly found an intent to torture. Pet.App. 132a. The Ninth Circuit correctly held that the state supreme court had failed to "engage in the analysis of the record necessary to conclude that the same result would have obtained" absent the error, and therefore failed to produce reweighing or harmless error analysis "to which deference might be appropriate." Pet.App. 21a.

this analysis, nor applied the *Chapman* or *Clemons* standards itself. Instead, it evaluated the case under *Brecht*, asking whether, in light of the record as a whole, the constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 22a-23a (quoting *Brecht*, 507 U.S. at 638).

The Ninth Circuit's approach implicates a longstanding split in the Circuits on the question of whether *Brecht* applies where the state courts have themselves failed to engage in meaningful harmless error analysis under *Chapman* (or, where available, reweighing under *Clemons*). The Ninth Circuit, like the majority of the other courts of appeals that have decided the issue,[19] applies *Brecht* on collateral review, even where the state appellate courts have not applied *Chapman* or *Clemons* in the first instance. *See* Pet.App. 22a (citing *Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir. 2000)).

The Eighth Circuit, by contrast, has held that when a state court has not conducted proper harmless error or reweighing analysis, federal courts must apply *Chapman* on collateral review to analyze the alleged constitutional error. *Williams v. Clarke*, 40 F.3d 1529, 1540-41 (8th Cir. 1994); *accord Lyons v. Johnson*, 912 F. Supp. 679, 687-89 (S.D.N.Y. 1996), *aff'd on other grounds*, 99 F.3d 499 (2d Cir. 1996); *see also, e.g., Horsley v. Alabama*, 45 F.3d 1486, 1498 n.3 (11th Cir. 1995) (Hatchett, J., dissenting) (favoring the Eighth Circuit's view that "the *Chapman* harmless error standard should apply when a federal habeas corpus court is the first court to conduct a harmless error analysis").[20]

Application of *Brecht* in cases where state courts have failed to apply *Chapman* or *Clemons* conflicts with the rationale underlying *Brecht*. *Brecht* held that it would be illogical "to

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[19] *See Smith v. Dixon*, 14 F.3d 956, 979-80 (4th Cir. 1994); *Billiot v. Puckett*, 135 F.3d 311, 319 (5th Cir. 1998); *Coe v. Bell*, 161 F.3d 320, 335 (6th Cir. 1998); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995); *Davis v. Dept. of Corrections*, 100 F.3d 750, 774 (10th Cir. 1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995).

[20] The First and Second Circuits have noted the continuing disagreement among the courts of appeals, but have not yet ruled on the question. *Sanna v. Dipaolo*, 265 F.3d 1, 14 & n.6 (1st Cir. 2001); *Benn v. Greiner*, 402 F.3d 100, 105 (2d Cir. 2005).

require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." 507 U.S. at 636. But the illogic of reapplying the *Chapman* standard on collateral review disappears where the state courts have not themselves performed the required analysis.[21] The comity concerns that militate against *de novo* federal review of state courts' analyses of constitutional trial error lack force where the state courts fail to perform that analysis in the first instance. Substitution of *Brecht* review for *Chapman* review is particularly inappropriate in capital cases, when the extraordinary stakes require "close appellate scrutiny of the import and effect of invalid aggravating factors." *Stringer*, 503 U.S. at 230.

Review of the Ninth Circuit's decision in *Morales* is warranted to resolve the longstanding split in the circuits and to ensure that the effects of constitutional error in capital sentencing proceedings receive at least one round of exacting judicial examination.

IV. This Court Should Grant Certiorari To Resolve Whether, When A Federal Court Of Appeals Holds That A State Court Has Failed To Conduct Constitutionally Adequate *Chapman* Or *Clemons* Analysis, It Should Remand To The State Court To Remedy The Error Or Conduct Its Own Harmless Error Review.

A case currently pending review in this Court involves the State of California's own challenge to the displacement of state appellate review under *Chapman* and *Clemons* by federal

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[21] As the Eighth Circuit stated in *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993):

> [T]he *Brecht* rule is based largely on the notion that because the state courts can properly apply the *Chapman* harmless error standard on direct review, the federal habeas courts need only review those decisions under the *Kotteakos* harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the *Chapman* harmless error standard. As a result, we find that [the] rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case.

harmless error analysis under *Brecht*. In *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1700 (2005), the Ninth Circuit ruled that California is a "weighing state," and that reviewing courts in California must therefore comply with *Clemons* in evaluating the effect of invalid special circumstances. 373 F.3d at 1062. On direct review of the death sentence in *Sanders*, the California Supreme Court struck two of the jury's four special circumstance findings, but affirmed the sentence based on its determination that a "reasonable juror could not have been swayed" by one of the invalid special circumstances and that "there was little chance defendant was prejudiced by consideration" of the other. *People v. Sanders*, 797 P.2d 561, 590 (Cal. 1990). The Ninth Circuit reversed, holding that the California Supreme Court's rationale did not meet the standard "for appellate review in a weighing state where an aggravating circumstance has been invalidated," because it left room for "substantial uncertainty about whether the state court actually concluded that the invalid aggravating factor was harmless beyond a reasonable doubt." *Sanders v. Woodford*, 373 F.3d at 1063. Citing "grave doubts" as to whether the erroneous special circumstance instructions "had substantial and injurious effect or influence in determining the jury's verdict," the Ninth Circuit held that the error was not harmless under *Brecht*. It instructed the district court to grant Sanders's petition as to the penalty phase unless California acted within a reasonable time to grant a new penalty trial or to vacate Sanders's death sentence and impose a lesser sanction. *Id.*

This Court granted certiorari in *Sanders* to resolve whether California is a weighing state and, if so, whether the Ninth Circuit misapplied *Brecht* in overturning the California Supreme Court's harmless error determination. *Brown v. Sanders*, 125 S. Ct. 1700 (2005). In its opening brief on the merits, California argues that federal courts applying *Brecht* on habeas review of death sentences must not usurp the state appellate courts' primary role of ensuring lawful operation of state capital sentencing procedures:

> Even if this Court should determine that California is a "weighing" state and the California Supreme

> Court's harmless error review was inadequate, *the proper remedy is not to reverse the penalty but to remand the case for proper state court review. Although this case is before this Court on federal habeas collateral review rather than direct appeal, remand to the Court of Appeals and thence to the state court is proper. Richmond v. Lewis*, 506 U.S. 40, 52 (1992).

Petitioner's Opening Brief at 32 n.16, *Brown v. Sanders* (No. 04-980) (emphasis added). According to California, the Ninth Circuit overstepped its authority in holding that particular capital sentencing errors are too severe to be resolved through further *Chapman* analysis or *Clemons* reweighing by the state courts.

Although the precise rule that California seeks to establish is new, this Court has affirmed the central role of state courts in ensuring that state capital sentencing systems conform to the requirements of the Constitution and the objectives of state lawmakers. For example, in *Richmond v. Lewis*, this Court held that, "[w]here the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 506 U.S. at 48-49; *see Stringer*, 503 U.S. at 237 ("Use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.").[22]

The circumstances surrounding Morales's death sentence underscore the importance of federal deference to state appellate courts in responding to capital sentencing error. Here, post-trial statements of jailhouse informant Samuelson

[22] For a time, the Fifth Circuit found it "quite clear," based on *Richmond* and *Stringer*, that only state courts can perform harmless error analysis of aggravating circumstances error in a weighing case. *Wiley v. Puckett*, 969 F.2d 86, 89, 94 & n.8 (1992); *King v. Puckett*, 1 F.3d 280, 283-84 (5th Cir.1993). In *Billiot v. Puckett*, 135 F.3d at 316, however, a Fifth Circuit panel overruled *Wiley* and *King*, holding that *Brecht* had established a blanket restriction on the "authority of a federal habeas court to grant habeas relief," including relief intended to provide for state courts to undertake harmless error or reweighing analysis in the first instance.

conclusively demonstrate that he fabricated his testimony regarding Morales's supposed jailhouse confession - testimony that was essential to the lying-in-wait finding on which Morales's death sentence rests. *See supra* at pp. 5-6. Cardenas's post-trial statements show that her testimony attributing self-incriminating statements to Morales - testimony that was likely to have carried considerable weight at the sentencing stage - was also false. *See supra* at p. 7. Because federal habeas review is confined to claims of constitutional error, neither the district court nor the Ninth Circuit has examined whether implementation of a death sentence predicated on such testimony is consistent with the purposes of California's capital sentencing system. The California courts, on the other hand, clearly have the authority to make this determination. *E.g., People v. Martinez*, 685 P.2d 816, 821 (1984).

In arguing, in *Sanders*, for strict limits on federal habeas review of capital sentencing errors under *Brecht*, the California Attorney General is implicitly concerned with preserving the finality of sentences that the State regards as having been validly imposed. The California Supreme Court certainly has an interest in reviewing constitutionally flawed sentencing proceedings to determine when constitutional errors are harmless and where imposition of the sentence in spite of trial errors comports with the purposes of the state penal code. But the California Supreme Court also has an equally strong interest in reviewing constitutionally flawed sentencing procedures to determine when imposition of the sentence violates the Constitution or state policies. If state-court primacy in the administration of capital sentencing requires a remand in *Sanders*, as the Attorney General contends, state-court primacy also dictates a remand in this case. Accordingly, even if this Court declines to review the division of authority concerning federal-court application of *Brecht* in the absence of meaningful *Chapman* or *Clemons* analysis by state appellate courts, it should, at a minimum, grant certiorari and hold this case for further review based on its resolution of the relationship between *Brecht* and state-court authority in *Sanders*.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 28, 2003 AND AMENDED OCTOBER 21, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-99020

MICHAEL ANGELO MORALES,

Petitioner-Appellant,

v.

JEANNE S. WOODFORD,
as Warden of San Quentin State Prison,

Respondent-Appellee.

Argued and Submitted Sept. 13, 2001.
Filed July 28, 2003.
Amended Oct. 21, 2004.

Before: FERNANDEZ, KLEINFELD, and McKEOWN, *Circuit Judges*.

ORDER

The opinion filed on July 28, 2003, is hereby amended. The clerk shall file the attached amended opinion and the attached dissent. The petition for rehearing and petition for rehearing en banc remains pending.

Appendix A

OPINION

KLEINFELD, Circuit Judge:

Michael Morales, a state prisoner convicted of murder with special circumstances and sentenced to death, appeals the district court's denial of his petition for a writ of habeas corpus.

We previously issued this opinion at 336 F.3d 1136 (2003). This version is identical to that one except for this paragraph, and the section on the lying- in-wait special circumstance, which appears in Part B of the Analysis section, pages 31 to 45.

Facts

A. The Murder and Investigation

Seventeen year-old Terri Winchell disappeared on a Thursday evening, January 8, 1981. Her mother lay sick in bed. Terri was getting ready to go out to pick up some food at a local restaurant. Before she left, she got a telephone call around 5:15 p.m. from Rick Ortega, a young man she knew through her friends. She spoke with him, then called her best friend Glenda Chavez. Terri told Glenda Chavez that Rick Ortega had asked her to go with him to the mall to pick out a present for his new girlfriend. Driving her mother's car, she left to pick up the food, telling her mother she "would be right back" and would be "back within the hour." Hours passed. Terri's mother became increasingly worried. She called the police to report that her car was missing around

10:00 that night, and reported that Terri was missing at 8:00 a.m. the next morning.

That day, Friday, the police interviewed Terri Winchell's mother, Terri's best friend Glenda Chavez, and Terri's friend Christine Salaices. They also interviewed Terri Winchell's boyfriend Randy Blythe.

The interviews led the police to Rick Ortega, whom they interviewed at a police station Friday night. Ortega gave the police permission to search his house and car, and they did, starting just before midnight Friday night. They found Ortega's shoes, which were wet, and noted that the tires and undercarriage of his car were also wet. The police found blood splattered all over Ortega's car, which smelled of ammonia. The officers returned to the station house around 1:00 a.m., Saturday morning. Around 2:00 a.m., Ortega led the police to a vineyard on the outskirts of town where they found Terri Winchell's body.

Terri was found naked except for a shirt and bra, which were pulled up over her breasts. She had suffered six blows to the side of her head and seventeen blows to the back of her head. The base of her skull had been shattered. Her skull, cheek bones, and jaw were fractured. She had been stabbed four times in the chest. Her face and body were severely bruised and much of the skin of her front side was torn up. She had multiple wounds on her hands and forearms, typical of a person defending herself.

Michael Morales was Ortega's cousin. He lived in Pat Flores's house. The police came there the next morning,

Saturday, with a search warrant. They found a claw hammer, not in a toolbox or tool drawer, but in the vegetable crisper in the refrigerator. Blood was found on the hammer, but there was not enough to get a blood type. They found a kitchen knife with the tip broken off in a kitchen cabinet. In a bedroom, they lifted the mattress off the box spring and found hidden between them a broken belt, which had blood on it consistent with Terri's. A wet towel smelling of ammonia was in a wastebasket. In another bedroom, they found a large kitchen knife on a night stand, and Terri Winchell's purse in the closet.

Morales was arrested and tried and convicted for rape and murder. So was Ortega, but his separate case is not before us.

B. The Trial

The government tried Morales on three theories of first degree murder—murder with premeditation, murder by torture, and murder by lying-in-wait—and two special circumstances—intentional killing by torture and intentional killing by lying in wait. The prosecution theorized that Rick Ortega wanted to kill Terri Winchell out of jealousy, because Rick's male lover, Randy Blythe, was also Terri Winchell's boyfriend. Also, Terri had embarrassed Ortega by calling him a homosexual to her friends. Ortega recruited his cousin Michael Morales to help him kill her, and Morales agreed out of family loyalty.

Randy Blythe, Terri's boyfriend, testified at Morales's trial that he had indeed been in sexual relationships with both

Rick Ortega and Terri Winchell. His relationship with Rick Ortega came first, though it was not entirely over when he became Terri Winchell's boyfriend.

Rick's former girlfriend Christine Salaices had been a friend of Terri Winchell. Christine testified that Rick Ortega had called her, crying, a few days after Terri and Randy Blythe started dating—ten months before the murder. Rick told Christine that he was crying because he had written Randy Blythe a letter proposing a sexual relationship, but that Randy then began seeing Terri. Christine then dumped Rick Ortega. Randy Blythe testified that Terri Winchell did not know he was having sex with Rick Ortega, but Rick Ortega knew that he was having sex with Terri. After Randy Blythe began dating Terri, Rick told him that "I wish you wouldn't spend so much time with her." When Randy tried to end his relationship with Rick Ortega, Rick threatened to kill Randy and his family.

Christine Salaices, Rick Ortega's previous girlfriend, testified that five months before the murder, in August 1980, she met Ortega at a restaurant, where Ortega had told her that "he wanted to go to Randy's house and he wanted to ring the doorbell, and he was gonna wait for Randy to come to the door and to open the door. And he was gonna have a knife in his hand and he was gonna repeatedly stab Randy and turn the knife in him to see the expression on his face." Christine testified that Ortega had told her that "his cousin Mikey [Morales] would be with him because Mikey wouldn't let him stop. Mikey would help him and Mikey wouldn't let him stop, that Mikey would be there." According to Christine, Ortega said that "if Terri was there, she was gonna get it,

too." Around the same time, Ortega repeatedly asked Christine to help him kill Randy Blythe. Christine testified that she had told Terri Winchell about Rick Ortega's threats. But, Christine, testified, by October 1980, three months before the murder, Rick Ortega "was supposedly feeling better about himself and trying to make amends with everyone that he had said these things to."

Mike Morales's girlfriend was Raquel Cardenas. Raquel testified that she had known Morales for seven months at the time of the murder. She testified that a few months before the murder, Morales told her that his "friend" had "gotten hurt by a girl, and . . . that he was feeling close to his best friend since he got hurt by that girl." Morales told her that this girl had "dumped" his friend and because of this "he turned gay."

Glenda Chavez, Terri Winchell's best friend, testified that two weeks before the murder, she spoke with Rick Ortega on the telephone. Rick told her that Terri "was going around saying that he was gay" and that Terri "was gonna pay back for everything she was saying about him." But Rick Ortega called Glenda back a week later and told her "to tell Terri that everything was okay, that he wanted to be friends with her, and that he was gonna come over sometime and talk with her."

Pat Flores lived in the same house where Morales lived. She testified that the day before the murder, while she was sitting in her kitchen, "Mike [Morales] come up from behind me and he threw a belt around my neck and he tightened it up a little bit. . . . And then I . . . took it off and I asked him

what he was doing. He said he was practicing. I asked him, I said, 'Well, who are you going to do this to?' He goes, 'Never mind.' And I go, 'Do I know him?' He goes, 'No. Neither do I.' "

Around 11:00 in the morning on the day of the murder, Morales's girlfriend Raquel Cardenas went to Morales's house, where he lived with Flores. Raquel testified that Morales got a phone call at 4:30 p.m. According to Raquel, Morales told her that it was Ortega, and that "Rick was gonna come over later" and "pick up a girl." Raquel testified that Morales said "he was gonna do Rick a favor," that "he was gonna hurt this girl," that "he was gonna strangle her," that "he was gonna use his belt" and "put it around her neck."

Glenda Chavez also testified that Terri called her the afternoon before she was murdered. Terri told Glenda that Rick Ortega had called and asked Terri to come to the mall to help him pick out a present for his new girlfriend.

Raquel Cardenas, Morales's girlfriend, testified that Flores came home to where Morales lived around 5:30 p.m. the afternoon of the murder, and that Rick Ortega showed up around 6:00 p.m. Rick stayed around ten minutes, then left with Flores to go to the store, and came back fifteen minutes later with some wine. Morales drank the whole bottle of wine. Raquel testified that Morales and Ortega left around 6:30 p.m. and someone said that "Rick was supposed to take a girl to the mall." She testified on cross-examination that she didn't see Morales leave with a knife or hammer and didn't see whether he was wearing a belt.

Appendix A

Pat Flores likewise testified that, on the day of the murder, Ortega came to her house around 6:30 p.m. and went out with her to the store, about five minutes away, and came back with wine. Flores testified that after Mike Morales and Rick Ortega left, she noticed her hammer was missing when she looked for it to hang a picture. She also noticed that one of her set of two similar kitchen knives was missing. Flores identified this knife on the witness stand at Morales's trial.

Raquel Cardenas testified that Morales and Ortega came back about an hour later. Morales put a purse on the table, and "dumped everything out of the purse and started searching it." He showed her Terri's high school identification card. Raquel testified that Morales "threw a belt at [her]" and "told [her] the belt broke."

Pat Flores likewise testified that when Morales came back, he had a broken belt with him. Flores also testified that she saw Morales come in and start water running in the kitchen sink, then go back outside. She noticed spots on Ortega's collar and sleeve, spots that Raquel thought appeared like blood, and testified that Ortega asked her how to get them out. Morales told Flores to look at Ortega's car, and she saw blood on the inside of the door, as did Raquel. Morales's hands "looked like he had blood on 'em."

Pat Flores testified that after Morales had driven Raquel home, he told Flores that "he had put a belt around someone's neck and then that it broke and then he—he hit her with the hammer and then—then they took her into a—field—and he drug her out of the car and then he—he— . . . He said that he stabbed her and then he said that he 'fucked her.' " When

Flores asked Morales why, he said, "Whatever my family wants me to do, I'll do it."

Raquel Cardenas also testified that Morales "told me how he killed her." He said Rick was driving, Terri was in the front passenger seat, and he was sitting behind her. He "tried to strangle her . . . with the belt and it broke so he hit her over the head . . . with a hammer" and "he just kept hitting her, then he dragged her out of the car" and "left her in the vineyard." Morales told Raquel "it took awhile," that Terri "was a tough girl," and that "she was screaming for Rick . . . to make him stop."

Randy Blythe (Terri Winchell's boyfriend, and also Rick Ortega's boyfriend) testified that around 8:30 that night, he got together with Rick Ortega in Ortega's car. Rick performed a sex act on Randy. Randy testified that the car "smelled like ammonia."

The prosecution also presented testimony from a jailhouse informant, Bruce Samuelson. Like Pat Flores and Raquel Cardenas, Samuelson testified that Morales had told him he had killed Terri Winchell. Samuelson testified that, Morales told him that Morales and Rick Ortega arranged how to murder Terri Winchell, and that Rick had called him after he had picked Terri up. Morales told Samuelson that he had prepared for the murder by taking a belt, a knife, and a hammer. Morales, according to what he had told Samuelson, attempted to strangle Terri, the belt broke, he beat her head with a hammer, dragged her out of the car, raped her, and stabbed her to death.

When the police searched the house where Pat Flores and Mike Morales lived, they found Terri Winchell's purse. Christine Salaices, Rick Ortega's former girlfriend, identified the purse as belonging to Terri, as did Terri's best friend Glenda Chavez. The police also found blood in the floormats and all over the inside of Rick Ortega's car, and the broken belt under the mattress, which had blood on it consistent with Terri Winchell's blood type.

Raquel Cardenas testified that a year and a half after the murder, not long before the trial, Morales called her and told her to "get out of town some way so that [she would not] be handed a subpoena." Referring to her prior statement to the police, Morales told her that "he forgave [her] the first time but wouldn't forgive me the second time."

The jury convicted Morales of first degree murder with premeditation, found both special circumstances—intentional killing by torture and intentional killing by lying in wait—and returned a verdict for the death penalty.

C. Post-conviction Proceedings

The California Supreme Court affirmed Morales's conviction, and the United States Supreme Court denied certiorari.[1] Morales's conviction became final November 27, 1989. He subsequently petitioned the United States District Court for a writ of habeas corpus on July 20, 1992, and after 20 of his 52 claims were dismissed without prejudice as not

1. *People v. Morales*, 48 Cal.3d 527, 257 Cal.Rptr. 64, 770 P.2d 244 (1989), *cert. denied*, *Morales v. California*, 493 U.S. 984, 110 S.Ct. 520, 107 L.Ed.2d 520 (1989).

exhausted, he went back to the state courts on a state habeas petition to exhaust them. The California Supreme Court denied his petition "on the merits and as untimely" on July 28, 1993.

Morales then amended his petition in the United States District Court. The district court considered the claims that the California Supreme Court had dismissed "on the merits and as untimely" as having been procedurally defaulted, but we reversed.[2] Our 1996 decision held that the California timeliness standards were too vague as applied to Morales's petition to furnish an adequate and independent state ground.[3] We therefore remanded for consideration of Morales's federal petition on the merits.

Back in district court, Morales moved for an evidentiary hearing on 39 of his 52 claims. That motion was denied, and ultimately Morales's petition was denied on the merits. So now, more than two decades after Terri Winchell was murdered, and after Morales was convicted by a jury in California Superior Court, lost his appeal in the California Supreme Court, was denied certiorari by the United States Supreme Court, lost his habeas case in the California Supreme Court, and lost his habeas case on the merits after some initial procedural skirmishing in the federal district court, we reexamine his case.

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2. *Morales v. Calderon*, 85 F.3d 1387, 1388 (9th Cir.1996).

3. *Id.* at 1390-91.

Appendix A

Analysis

Morales's petition for writ of habeas corpus was filed before the effective date of the Antiterrorism and Effective Death Penalty Act[4] ("AEDPA") but his appeal was filed after that date. Under our en banc decision in *Mayfield v. Woodford*,[5] we therefore apply pre-AEDPA law to the merits of the petition and our standard of review,[6] but post-AEDPA law on the statutory requirement[7] for a certificate of appealability. A certificate of appealability, which may only be granted on an issue-by-issue basis,[8] may only issue if Morales makes a "substantial showing of the denial of a constitutional right."[9] Morales satisfies this standard by demonstrating "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."[10] On the merits, treating this as a pre-AEDPA

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4. Pub.L. No. 104-132, April 24, 1996, 100 Stat. 1214.

5. 270 F.3d 915 (9th Cir.2001) *(en banc)*.

6. *Id.* at 921 & n. 5 (citing *Slack v. McDaniel*, 529 U.S. 473, 481-82, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

7. *See* 28 U.S.C. § 2253 (2000).

8. *Morris v. Woodford*, 229 F.3d 775, 779 (9th Cir.2000).

9. 28 U.S.C. § 2253(c)(2).

10. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003) (citation omitted) (quotation omitted).

petition, "[w]e presume that the state court's findings of historical fact are correct and defer to those findings 'in the absence of convincing evidence to the contrary' or a demonstrated lack of 'fair support in the record.' We review mixed questions of law and fact . . . de novo. Finally, we review pure questions of law de novo."[11]

The certificate of appealability from the district court did not specify which issues could be appealed. We may not review the merits of Morales's appeal, however, unless we first determine with regard to each claim that Morales has made "a substantial showing of the denial of a constitutional right" that would justify issuing a certificate of appealability.[12] As we must issue a certificate of appealability on an issue-by-issue basis,[13] we treat the brief as requesting a certificate of appealability on all the issues presented, and grant it for: (1) improper jury instruction on the torture special circumstance; (2) unconstitutionality of the lying in wait special circumstance; (3) knowing use of false testimony of Raquel Cardenas; (4) use of a jailhouse informant (Samuelson) to evade Morales's right to counsel; (5) Confrontation Clause violation for Rick Ortega's remarks to Christine Salaices some months before the murder. We deny a certificate of appealability as to the remaining

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11. *Mayfield*, 270 F.3d at 922 (citations omitted) (quoting 28 U.S.C. § 2254(d) (1994)).

12. 28 U.S.C. § 2253 (2000).

13. *Morris*, 229 F.3d at 779.

contentions and the undeveloped arguments suggested in footnotes.[14]

A. Torture Special Circumstance

The California statute governing death penalty procedures provides that, in the phase of the trial for determining whether the defendant is guilty of first degree murder, the trier of fact must "determine the truth of all special circumstances."[15] A finding of "one or more" special circumstances in California causes the murder to enter a penalty phase where the trier of fact determines whether to sentence the defendant to death or to life imprisonment without the possibility of parole.[16]

One of the special circumstances, which the jury in the case at bar found to be true, is that "the murder was intentional and involved the infliction of torture."[17] Morales argues that

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14. *See* 28 U.S.C. § 2253(c)(1). We also do not review Morales's challenges to various collateral rulings of the district court because he has not properly presented them in his brief. *See In re Lowenschuss*, 67 F.3d 1394, 1402 (9th Cir.1995) (deeming as waived inadequately raised issues); *International Olympic Committee v. San Francisco Arts & Athletics*, 781 F.2d 733, 739 (9th Cir.1986) (declining to review an issue raised in a footnote and taking "the briefs as submitted" and limiting review "to the issues set forth in the briefs as required by Fed. R.App. P. 28(a)(2).").

15. Cal.Penal Code § 190.1.

16. *Id.* at §§ 190(b), 190.2(a).

17. *Id.* at § 190.2(a)(18).

under a previous decision of ours, *Wade v. Calderon*,[18] he is entitled to have his petition granted because the jury instruction on this special circumstance was incorrect.

Morales's jury received two instructions regarding torture, one directed at torture as an element making the murder first degree, and the other directed at the special circumstance. Morales asserts that the torture special circumstance instruction erroneously omitted the intent requirement. The first degree murder instruction told the jury that torture requires an "intent to cause cruel pain and suffering" but it also told them that this "instruction does not apply to the special circumstance allegation of murder by torture."[19] The special circumstance instruction, on the

18. 29 F.3d 1312 (9th Cir.1994).

19. The jury was instructed as follows on first degree torture murder:

> Murder which is perpetrated by torture is murder of the first degree. The essential elements of such murder are one, that the act or acts which caused the death must involve a high degree of probability of death; and two, *the defendant must commit such act or acts with intent to cause cruel pain and suffering*. . . .
>
> The crime of murder by torture *does not necessarily require any proof that the . . . deceased suffered pain.*
>
> *This instruction does not apply to the special circumstance allegation of murder by torture.* The elements required for that special circumstance allegation will appear later in these instructions.

(emphasis added).

other hand, told the jury that to find the torture special circumstance to be true, they had to find that "the murder involved the infliction of torture." The instruction did not require an intent to cause severe pain.[20]

We held in *Wade v. Calderon* that this same California torture special circumstance instruction violated the Eighth Amendment,[21] adopting the reasoning of the California Supreme Court decision in *People v. Davenport*.[22] In *Wade*, we concluded that, without a jury determination that the defendant intended to torture, the distinction between murders where the victim did and did not feel extreme pain

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20. The jury was instructed as follows on the torture special circumstance:

> To find that the special circumstance . . . [of] murder involving infliction of torture is true, each of the following facts must be proved. One, that the murder was intentional; and two, that the murder involved the infliction of torture.
>
> To prove the infliction of torture, *the infliction of extreme physical pain must be proved* no matter how long its duration.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(emphasis added).

21. *Wade*, 29 F.3d at 1320.

22. 41 Cal.3d 247, 221 Cal.Rptr. 794, 710 P.2d 861 (1985).

might "have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder."[23] We accordingly directed the district court to issue the writ because we held, under the facts presented in *Wade*, that this error was not harmless.[24] We provided that no new sentence of death could be imposed without a new determination of special circumstances.

The case at bar is indistinguishable from *Wade*, as to the error regarding the instruction on the torture special circumstance. The next issue is whether, as in *Wade*, the writ must be granted unless a new sentence of death is imposed without the special circumstance.

The State argues that because *Wade* came down in 1994, after Morales's conviction was final, it was a "new rule," so it could not be applied to Morales's case.[25] We reject this argument because the rule was not new. When Morales's direct appeals were pending, the California Supreme Court had already held in *Davenport*, the case quoted and in this respect followed by *Wade*, that the special circumstance instruction for torture had to require a finding of intent, or else it would allow arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment.

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23. *See Wade*, 29 F.3d at 1320 (citing *Davenport*, 221 Cal.Rptr. at 804, 710 P.2d 861).

24. *Id.* at 1322, 221 Cal.Rptr. 794, 710 P.2d 861.

25. *See Teague v. Lane*, 489 U.S. 288, 306-08, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

On Morales's direct appeal, the California Supreme Court held that the torture special circumstance instruction was error.

Following the California Supreme Court decision affirming Morales's conviction,[26] the State also argues that the instructional error was harmless. The California Supreme Court concluded, and the State urges us to agree, that the jury necessarily found the requisite intent pursuant to its instruction on torture as an element in first degree murder. That contention is incorrect. The instructions allowed the jury to treat the murder as first degree on various grounds without finding an intent to torture, such as if it found premeditation and deliberation. The verdict does not establish that the jury found the element of torture as a basis for its first degree murder verdict.

The State also argues that the closing arguments by counsel sufficiently educated the jury that intent was essential. We must presume, however, that the jury took the court's instructions as its authority on the law, and the instructions told the jury that intent is an element of torture as a basis for first degree murder but is not an element of the torture special circumstance. The instructions also informed the jury that the first degree murder torture element and the special circumstance of torture are different and one did not speak to the other. Thus, we cannot assume that the jury's finding of intent with respect to the first degree murder instruction necessarily means that the jury would have found intent with respect to special circumstances. Although the

26. *See People v. Morales*, 48 Cal.3d 527, 257 Cal.Rptr. 64, 770 P.2d 244 (Cal.1989).

jury made a finding that Terri Winchell "was aware of extreme physical pain inflicted by said defendant," the jury did not make a finding that Morales intended to inflict it.

In Morales's direct appeal, the California Supreme Court reasoned that the jury necessarily found as a matter of logic an intention to inflict severe pain on Terri Winchell, because otherwise "there would have been no purpose in its special finding regarding the victim's awareness of the extreme physical pain."[27] We do not agree that the awareness of pain finding implies a jury determination on intent. There may have been no purpose in *instructing* the jury to make a finding about the victim's awareness of pain, without an instruction requiring intent, but the *jury's* purpose may have been merely to follow the instructions and fill in the answers to the questions provided to it.

The State also argues that the error was harmless because the jury also found true the lying in wait special circumstance. Morales argues that the lying in wait instruction was also unconstitutional, but as we explain below, we conclude that it was constitutionally permissible.

The analysis of the instructional error depends, under controlling law, on whether California is a weighing or a non-weighing state.[28] We have previously said in dictum that

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27. *Id.* at 83-84.

28. *Stringer v. Black*, 503 U.S. 222, 229-30, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir.1995); *Jeffers v. Lewis*, 38 F.3d 411, 414-15 (9th Cir.1994) (en banc).

California is a weighing state under the current version of its death penalty statute.[29] If all the special circumstance of torture did was to move the case to a penalty phase, and the special circumstance was not weighed as such (though the evidence could be considered) at the penalty phase, then validity of the lying in wait special circumstance would make invalidity of the torture special circumstance harmless.[30] In a weighing state, on the other hand, we may not "assume it would have made no difference if the thumb had been removed from death's side of the scale."[31] Rather, "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[32]

We need not decide whether California is a weighing state to decide this case. Assuming *arguendo* that it is, harmless error analysis leads us to conclude that Morales is not entitled to relief.

We note first that, although the jury weighed an invalid special circumstance, the California Supreme Court could have cured the error and affirmed Morales's sentence in several ways[33] First, the California Supreme Court could have found the

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29. *Silva v. Woodford*, 279 F.3d 825, 829 & n. 1 (9th Cir.2002).

30. *See Williams*, 52 F.3d at 1479.

31. *See Stringer*, 503 U.S. at 232, 112 S.Ct. 1130.

32. *Id.*

33. *See Valerio v. Crawford*, 306 F.3d 742, 756-57 (9th Cir.2002) (en banc).

error harmless under *Chapman v. California.*[34] Under *Chapman*, the state appellate court can affirm if it finds beyond a reasonable doubt that the same result would have been obtained without relying on the unconstitutional aggravating circumstance.[35] The California Supreme Court also could have cured the instructional error by "reweighing" aggravating and mitigating circumstances under *Clemons v. Mississippi.*[36]

Here, however the California Supreme Court simply asserted that the instructional error was harmless and did not engage in the analysis of the record necessary to conclude that the same result would have been obtained without relying on the torture special circumstance. Nor did the California Supreme Court perform any reweighing of the factors the jury considered, excluding the torture special circumstance, because it concluded (mistakenly in our view) that the finding that the victim suffered severe pain logically implied that it had found intended torture. Under our en banc decision in *Valerio v. Crawford*, this was insufficient.[37]

We therefore have neither state appellate court reweighing nor harmless error analysis to which deference might be appropriate.[38] In the absence of the requisite "close

34. 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

35. *Valerio*, 306 F.3d at 756.

36. 494 U.S. 738, 748, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

37. *Valerio*, 306 F.3d at 756-60.

38. *Id.* at 757.

appellate scrutiny" by the state courts reviewing Morales's sentence, we must conduct our own independent harmless error analysis.[39]

Ninth Circuit precedent requires us in this circumstance to apply *Brecht* harmless error review to the mistaken torture special circumstance instruction.[40] The torture special circumstance, for which the instruction was unconstitutionally erroneous, was among the factors the jury was to weigh, though it was no more than that. As we have already held this was error, the state must provide us with a "fair assurance" that the error was harmless under *Brecht*.[41]

Brecht v. Abrahamson holds that where there is constitutional error but the review is collateral rather than direct, we should not apply the "harmless beyond a reasonable doubt" *Chapman*[42] standard, and should instead apply the "less onerous" *Kotteakos* standard.[43] Accordingly, the critical question is

39. *Id.* at 761.

40. *See id.* at 762. *See also Wade*, 29 F.3d at 1322. Because Morales is a state prisoner seeking a writ of habeas corpus, we must apply *Brecht* harmless error analysis. *See Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.2000). That Morales's sentence is for death does not change this analysis. *See Valerio*, 306 F.3d at 762.

41. *Valerio*, 306 F.3d at 762 (citing *Gray v. Klauser*, 282 F.3d 633, 651 (9th Cir.2002)).

42. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

43. *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (referencing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

"whether, in light of the record as a whole," the error "had substantial and injurious effect or influence in determining the jury's verdict."[44] On collateral review, *Brecht* holds that a federal court cannot grant the writ based merely on a "reasonable possibility" that the constitutional error contributed to the verdict, but only where the petitioner "can establish that it resulted in actual prejudice."[45]

There are some cases where an instructional error like the one Morales suffered would be, as a matter of law, not harmless under *Brecht.* For instance, in *Wade*, the error was not harmless as a matter of law because our invalidation of the special circumstance eliminated the only remaining special circumstance.[46] Thus, our holding in *Wade* meant that the prisoner was no longer death penalty eligible under California law, so that the error was manifestly not harmless. But, in the case at bar, Morales, unlike Wade, remains death penalty eligible due to the validity of the lying in wait special circumstance. Thus, we must determine based on a close review of the record as a whole "whether the actual instruction had a substantial and injurious effect or influence on the jury's verdict."[47]

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44. *Id.*

45. *Id.* at 637, 113 S.Ct. 1710.

46. As our opinion in *Wade* notes the other special circumstance Wade's jury found to be true was invalidated by the California Supreme Court. *See Wade*, 29 F.3d at 1322-23.

47. *Valerio*, 306 F.3d at 762.

Appendix A

Applying the *Brecht* standard, we conclude, after thorough study of the record "as a whole," that the instructional error regarding the torture special circumstance did not have a "substantial and injurious effect or influence in determining the jury's verdict." The state's testimonial and physical evidence implicating Morales was overwhelming. There was no conflicting evidence regarding whether Morales murdered Terri Winchell, why he murdered her, or how he murdered her. And it was an entirely gratuitous and terribly vicious murder.

As in *Williams v. Calderon*, consideration of the torture special circumstance as such "adds only an improper label."[48] Because Terri Winchell took so long to die, not only was the abuse extreme, but Morales had a long time to repent, had he been morally so disposed, even during his acts of strangling, hammering and stabbing her. There is no reason to doubt on this record that the jury decided that Morales murdered her because he was Rick Ortega's cousin and Rick was angry at and jealous of her. There is no reason to doubt that the jury decided Morales helped trick her into the car, sat behind her planning to kill her after some practice with a belt and having brought a belt, hammer, and knife to do it with. There is no reason to doubt that after he failed to kill her by strangling her with the belt, he beat her head in with a hammer, and when she still lived, dragged her out of the car, raped her, and stabbed her several times. Because we cannot, on this record, doubt that the jury so found, it would be unwarranted for us to think that it mattered to the jury whether Morales's conduct was labeled "torture special circumstance" by the California statute. To grant the writ under these

48. *Williams*, 52 F.3d at 1477.

circumstances would be to act on, at most, a "reasonable possibility" that the special circumstance label mattered to the verdict, and *Brecht* prohibits us from doing that.

The evidence was so overwhelming that the constitutional error cannot be said to have had an effect upon the verdict in the case at hand.[49] The jury could have decided that Morales initially intended to kill Terri Winchell quickly without much pain by strangling her. But the jury knew two things that would prevent them from ending their inquiry there. One was that he brought a hammer, which meant that he did not know if strangling would work, and intended to beat her head in if it did not. The second, unavoidable conclusion was that he kept going after strangling failed. Once she survived the strangling, the jury would have had to decide that he intended his subsequent conduct even though he saw as he performed it that she was surviving and suffering.

Given the factual record here, it is mere speculation that the absence of the torture special circumstance would have mattered to the jury. Mere speculation is insufficient to grant the writ under *Brecht*, because speculation does not give rise to a "grave doubt" whether the error had a substantial effect in determining the jury's verdict.[50] A harmless error analysis

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49. *Id.*

50. *See Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir.2000) (citing *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)).

that would vacate the death sentence absent the jury "necessarily" finding the torture murder special circumstance is "far too strict" under *Brecht*.[51]

B. Lying-In-Wait Special Circumstance

The jury also found the special circumstance of lying in wait to be true. The instructions defined "lying in wait" as requiring "waiting, watching, and concealment," followed by immediate, surprise attack. The instructions further defined "concealment" as "ambush" or, alternatively, "creation of a situation where the victim is taken unawares even though he sees his murderer." The instructions given to the jury qualified this definition by explaining, "it is only concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise." A "perceptible interruption" between the "concealment and watchful waiting" and the period during which the killing took place would defeat the special circumstance.

Under the California statutes at the time of Morales's trial, murder committed "by means of" lying in wait was, by virtue of that aggravating factor, first-degree murder.[52] Murder that is first-degree, whether for that reason or another, and that was committed in the "special circumstance" that

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51. *See California v. Roy*, 519 U.S. 2, 4, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) (per curiam).

52. Cal.Penal Code § 189.

the killing is "while" lying in wait, subjects the defendant to a sentence of life without possibility of parole, or death.[53] The "by means of" factor enhances the murder to first-degree murder, and the "while" factor allows the first-degree murderer to be death-penalty eligible. Then the jury weighs the "while" factor, along with many others, to determine whether to impose the death penalty.[54]

Morales's argument makes no reference to the actual instructions the jury was given or the evidence the jury heard in this case. Nor does Morales claim that the actual jury instructions failed to distinguish meaningfully between lying in wait and mere premeditation and deliberation. Without some connection between the claimed constitutional problems with the lying-in-wait circumstance and what actually occurred in Morales's trial, we cannot say that the Eighth Amendment was violated in this case by the manner in which the special circumstance was applied. Morales instead makes a facial challenge.

As for the constitutionality of the special circumstance on its face, a circumstance that makes one eligible for the death penalty must meet two requirements to satisfy the Eighth Amendment: "First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a sub-class of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally

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53. *See id.* §§ 190.1, 190.2(a)(15).

54. *See id.* § 190.3.

vague."[55] Morales appears to be arguing that neither of these requirements is satisfied by the lying-in-wait special circumstance. The dissent accepts Morales's first argument, taking the position that the special circumstance applies to virtually every murderer.

We have revised this section of the opinion to respond to the dissent and to appellant's clarification of his argument in his petition for rehearing. Though our opinion as previously published was unanimous, we have all carefully considered the petition for rehearing, and our dissenting colleague has changed her mind on this point. The dissent now takes the position that "the confluence of lying-in-wait and other types of murder is virtually complete."[56]

Under *Godfrey v. Georgia*, for death-penalty eligibility standards to satisfy the Eighth Amendment's non-vagueness requirement, such eligibility criteria must provide "a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not."[57] This requires the state to provide "clear and objective standards" that "channel the sentencer's discretion," obviating "standardless sentencing discretion."[58] If the

55. *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (internal citations omitted).

56. Dissenting Op., at 1180.

57. *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (internal quotation marks and editing omitted).

58. *Id.* at 428, 100 S.Ct. 1759 (internal quotation marks and editing omitted).

standards are "so vague that they would fail" to channel discretion, then they allow "arbitrary and capricious sentencing" in violation of the Eighth Amendment.[59] The Court in *Tuilaepa v. California* rejected a broad challenge to the California scheme before us now.[60] In so doing the Court held that the *Godfrey* requirements are "not susceptible of mathematical precision" so "vagueness review is quite deferential."[61]

We held in *Houston v. Roe* that the California "lying in wait" special circumstance is not unconstitutionally vague as an eligibility factor.[62] Our holding in *Houston* was premised on the conclusion that California had "created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait."[63] While *Houston* was a Fifth-Amendment due-process case rather than an Eighth-Amendment case, it asked and answered the question whether the lying-in-wait circumstance was too vague. *Houston* thus makes clear that the lying-in-wait circumstance satisfies at least one of the two requirements—avoidance of vagueness—that the Supreme Court has imposed on eligibility determinations.

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59. *Id.* (internal quotation marks omitted).

60. *Tuilaepa*, 512 U.S. at 972-73, 114 S.Ct. 2630.

61. *Id.* at 973, 114 S.Ct. 2630 (internal quotation marks omitted).

62. *Houston v. Roe*, 177 F.3d 901, 907-08 (9th Cir.1999).

63. *Id.* at 907.

As the Supreme Court made clear in *Tuilaepa*,[64] however, vagueness is not the only inquiry. We must also ensure that the California regime adequately narrows the class of murderers subject to the death penalty. The remainder of this section addresses that issue, without reliance upon *Houston* and other Fifth Amendment analysis. The dissent appears to imply that our Eighth Amendment analysis is based on "reliance on *Houston* [ ]" for "the lying-in-wait special circumstance."[65] Here in the paragraphs below is the separate analysis of the Eighth Amendment issue. We follow *Houston* for vagueness, as stare decisis requires, but not for the Eighth Amendment narrowing issue.

The lying-in-wait circumstance is not overly broad such that it "appl [ies] to every defendant convicted of a murder." Such over breadth would render it inadequate under *Tuilaepa*.[66] Evidently, California regards ambush as an especially immoral way of murdering someone. The lying-in-wait special circumstance codifies that moral sentiment. Our dissenting colleague is quite right that the California Supreme Court has interpreted it liberally, to embrace not just traditional ambush, but murder accomplished by surprising the victim. Where we differ is that the dissent thinks almost all first-degree murders satisfy the California lying-in-wait requirements as so interpreted, and we do not. The three elements of lying in wait, in California law, are

64. *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

65. Dissenting Op., at 1181.

66. *Tuilaepa*, 512 U.S. at 972, 114 S.Ct. 2630.

"(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."[67] The combination of these elements embraces some first-degree murders, but not all.

To illustrate a non-lying-in-wait murder: a sadistic person who wants the victim to know what is coming, and who has no doubt of his ability to accomplish the crime, may confront the victim face to face, say "I'm going to kill you," and do so. Or a person intending to kill another may threaten the victim, travel armed, and when he spots his intended victim by chance, approach him and shoot him face to face. Or, not uncommonly, the loser of a bar fight may say "I'm going to kill you," go to his car or his home and get a gun, come back to the bar, confront the victim saying "now I'm going to kill you," and do so. Even under the California Supreme Court's liberal interpretations of lying in wait, these hypothetical first-degree murders would not merit the special circumstance. The dissent says that "like a Venn diagram of nearly overlapping circles, the confluence of lying-in-wait and other types of murder is virtually complete."[68] The weasel words here are "nearly" and "virtually." Without them, these common murder scenarios falsify the dissent's proposition. With the words "nearly" and "virtually," it is hard to attribute any meaning to the dissent's proposition, because it apparently cannot be falsified by any empirical demonstration. These common murder scenarios would be

67. *Morales*, 257 Cal.Rptr. 64, 770 P.2d at 261.

68. Dissenting Op., at 1180.

cases within what the dissent claims is the empty ("nearly" empty? "virtually" empty?) set of first-degree murders not involving lying in wait.

Four California Supreme Court decisions similarly illustrate facts placing the cases in the set that our dissenting colleague thinks is the empty set of first-degree murders that do not involve lying in wait. In *In re Andrews*, a robber killed three victims, one for trying to escape, another apparently for not telling him where the drugs and money he wanted were, and a third apparently for walking in on the crime.[69] There was no lying in wait. In *People v. Anderson*, the defendant and another murdered a woman because they thought she had molested the daughter of one of the murderers.[70] The victim had already been beaten, stripped naked, and tied up by the defendant and others. When the defendant and his accomplice spotted her after she got herself free and was escaping, they pulled her into their car and killed her.[71] No concealment of purpose, no watching and waiting, no surprise. In *People v. Reynoso*, two men argued heatedly, and then one shot the other dead, in the chest, with a shotgun at point-blank range.[72] No ambush there, no matter how

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69. *In re Andrews*, 28 Cal.4th 1234, 124 Cal.Rptr.2d 473, 52 P.3d 656, 658 (2002).

70. *People v. Anderson*, 28 Cal.4th 767, 122 Cal.Rptr.2d 587, 50 P.3d 368, 370 (2002).

71. *Id.*

72. *People v. Reynoso*, 31 Cal.4th 903, 3 Cal.Rptr.3d 769, 74 P.3d 852, 855 (2003).

liberally lying in wait may be construed. In *People v. Batts*, two gang members, including the defendant, told a younger member to leave the place where the younger member was washing his car, or else something would happen.[73] The younger man refused to leave and, along with his brother, argued with the older gang members. So the defendant and his friend left, returned armed (the defendant had a gun in each hand, the other man made do with one gun), and shot the younger men, killing one of them.[74] No ambush there, just a head-on attack with three guns blazing.

To us, it seems unimaginative, or perhaps blind to these and the many cases like them, to suppose that "the confluence of lying-in-wait and other types of murder is virtually complete."[75] As we have explained above, to prove the special circumstance of lying in wait under California law, the government must prove first-degree murder plus the three elements of lying in wait: concealment of purpose, watching and waiting, and a surprise attack from a position of advantage.[76] We have described murders committed in ways that would not satisfy one, or even any, of these three requirements. Some murders are accomplished by ambush, some are not, and the special circumstance sorts out which is which.

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73. *People v. Batts*, 30 Cal.4th 660, 134 Cal.Rptr.2d 67, 68 P.3d 357, 361 (2003).

74. *Id.* at 361-62.

75. Dissenting Op., at 1180.

76. *Morales*, 257 Cal.Rptr. 64, 770 P.2d at 261.

The dissent's position is, in substance, that the California Supreme Court has not really meant what it said when it laid out the three requirements of lying in wait because it has interpreted them so broadly as to eliminate any discrimination between lying-in-wait murders and all other first-degree murders. The dissent says first-degree murders and lying-in-wait murders are "like a Venn diagram of nearly overlapping circles"[77]—that is, nearly congruent sets, with no cases in the first-degree murder set that are not in the lying-in-wait set. Factually, as the cases described above show, this contention is entirely without force.

The dissent's legal argument relies on mistaken use of quotations and citations pulled out of context from some California cases. As described above, lying in wait, under California law, is a term used not only for a death-penalty special circumstance, which is the subject of this case; it is also a term used to describe a substitute for premeditation and deliberation when determining whether a murder is a first-degree murder. That is, entirely apart from how it may affect his penalty, if a person lies in wait to kill another, California treats him as having the equivalent of premeditation and deliberation.

While the meanings of the term "lying in wait" in these two contexts are obviously related, they have been interpreted to mean different things. The California Supreme Court has expressly stated that lying in wait as a special circumstance for the death penalty contains "more stringent requirements"

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77. Dissenting Op. at 1180.

than lying in wait as an indicator of first-degree murder.[78] Among the distinctions is that lying in wait as a special circumstance, unlike lying in wait as a first-degree factor, requires all three elements mentioned above—concealment of purpose, watching and waiting, and surprise—and lying in wait as a special circumstance requires that the murder be committed *while* lying in wait.[79] That is, the special circumstance has the requirement that there be no gap in time between the murder and the period of watching and waiting. This is not required for lying in wait as a substitute for premeditation and deliberation. Thus, lying in wait as a special circumstance is more difficult to satisfy than is lying in wait as an aggravator that makes a killing first degree murder.

Despite the differences in the term's meaning, the dissent quotes from and relies on several cases about the premeditation and deliberation substitute to make its point about the death-penalty special circumstance. The dissent's citations manifest confusion about the distinction between the two uses of lying in wait. Because the term is used for a different purpose in the cases the dissent cites, those cases are inapposite. What's more, even though the language in some of the dissent's chosen cases is liberal and permissive, the facts in each case show that the defendant in each did in fact engage in a genuine ambush.

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78. *People v. Hillhouse*, 27 Cal.4th 469, 117 Cal.Rptr.2d 45, 40 P.3d 754, 775 (2002) (internal quotation omitted).

79. *See People v. Gutierrez*, 28 Cal.4th 1083, 124 Cal.Rptr.2d 373, 52 P.3d 572, 612-13 (2002).

For example, the dissent quotes from *People v. Ruiz* to argue that the California Supreme Court has interpreted lying in wait as " 'the functional equivalent of proof of premeditation, deliberation and intent to kill.' "[80] The court in *Ruiz*, however, was addressing lying in wait as a factor that turns murder into first-degree murder, not lying in wait as a special circumstance for death-penalty eligibility. Lying in wait is, of course, the "functional equivalent" of first-degree murder when the court is considering lying in wait as a substitute for premeditation and deliberation to raise murder to the first degree. But that does not mean that the death-penalty circumstance, particularly with its requirement that the murder be committed *while* the killer lies in wait, is the "functional equivalent" of first-degree murder. The special circumstance is not what the California Supreme Court was talking about in *Ruiz*. Furthermore, *Ruiz* involved a defendant who "watched and waited until his victims were sleeping and helpless before executing them," which supports a finding of lying in wait under any definition.[81] Thus, neither the "functional equivalent" statement nor the facts of *Ruiz* support the dissent's argument.

Likewise, *People v. Tuthill*, upon which the dissent relies to argue that the watching-and-waiting element is meaningless, is also a case about lying in wait as a first-degree factor rather than as a death-penalty special circumstance.[82] And like *Ruiz*,

80. Dissenting Op., at 1185 (quoting *People v. Ruiz*, 44 Cal.3d 589, 244 Cal.Rptr. 200, 749 P.2d 854, 867 (1988)).

81. *See Ruiz*, 244 Cal.Rptr. 200, 749 P.2d at 867.

82. Dissenting Op., at 1187 n. 2 (citing *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16, 20 (1947)).

the facts of that case do not support the suggestion that the term is promiscuously applied to all murders and, therefore, that lying in wait does not mean anything. In *Tuthill*, the defendant "entered the cabin surreptitiously, after [the victim's] repeated refusals to see him alone, took the gun from the wall, loaded it, and lay down on the bed concealing it."[83]

People v. Hillhouse is the only case whose facts the dissent discusses that really is about lying in wait as a death-penalty special circumstance. The dissent says that *Hillhouse* establishes that "even concealment of purpose is not always necessary," and that under California law "criminal defendants meet the concealment test regardless of whether they are hidden or seen, and even whether they conceal their intentions or reveal them."[84] Not so. The victim flashed a hundred-dollar bill in a bar, so when he was drunk, the murderer drove him to a remote location. While the victim was urinating next to the truck, the murderer said, "I ought

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83. *Tuthill*, 187 P.2d at 21. The dissent also points to the fact that the defendant in Tuthill fell asleep while he waited, which the dissent says undermines any meaning that the "watchful and waiting" requirement would otherwise have. Dissenting Op., at 1187 n. 2. The dissent does not mention, however, that the court considered this point and concluded that "[d]efendant's presence in the cabin was unexpected, and obviously [the victim] was unaware of her danger, of the tenacity of the defendant's grim objective and of his purpose to kill her." *Tuthill*, 187 P.2d at 21. That the defendant fell asleep waiting for the victim of his ambush to arrive did not vitiate the fact that he ambushed his victim.

84. Dissenting Op., at 1187.

to kill you," and stabbed him to death.[85] The court said that the jury could reasonably conclude that, planning to kill the victim, the murderer "waited and watched for the opportune moment to strike, which presented itself when [the victim] was urinating."[86] Though the dissent claims that the statement, "I ought to kill you," makes meaningless the requirement of concealment, the court concluded that the remark was "virtually simultaneous with the stabbing," and the murderer "took him by surprise."[87]

Not every ambush has to be from the bushes. Our dissenting colleague calls this remark "a simplistic syllogism,"[88] but it is neither a syllogism nor simplistic. California has broadened the meaning of lying in wait beyond B-movie stage-coach robberies. That does not mean the term has no narrowing meaning. That not every ambush has to be from the bushes, yet murders by ambush differ from murders without ambush, is, in short and plain form, the answer to the narrowing argument. Clarity is not the same thing as oversimplification. Obfuscation can be a shield for murderers.

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85. *Hillhouse*, 117 Cal.Rptr.2d 45, 40 P.3d at 775.

86. *Id.*

87. *Id.*

88. Dissenting Op., at 1180.

Appendix A

C. Knowing Use of Perjury

Morales argues that he was denied due process of law by the government's knowing use of perjured testimony by Raquel Cardenas to obtain his conviction. The government's knowing use of perjured testimony to obtain a conviction violates a defendant's right to due process of law.[89]

In 1994, over a decade after the trial, Raquel Cardenas signed an affidavit for Morales saying that she had lied in her trial testimony. Specifically, she stated that she lied when she testified that Morales told her that he had murdered Terri Winchell, that he told her how he committed the murder, and that she saw blood in the car. Though Raquel's recantation, if true, undermines some of her testimony it would not undermine all of it. Nor does her affidavit demonstrate that the prosecution knew that she was lying during her testimony at trial.[90]

The due process requirement voids a conviction where the false evidence is "known to be such by representatives of the State."[91] The essence of the due process violation is

89. *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir.2000).

90. In the recantation affidavit, Raquel Cardenas says that Morales returned to the apartment "all riled up" after about an hour, "threw a purse at me," and exclaimed that "the damn belt broke." Though Raquel says she felt pressured when she made her statement to the police and when she testified, Raquel says nothing whatsoever in her recantation affidavit to suggest that the police or the prosecution knew she was lying.

91. *Id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)).

misconduct by the government, not merely perjury by a witness.[92] Morales, however, sets out no factual basis for attributing any misconduct, any knowing presentation of perjury, by the government. Thus there is no basis for granting the writ even if Raquel Cardenas did lie. That a witness says some years later that she lied at trial does not furnish a basis for granting the writ on account of the state's *knowing* use of perjury (though, of course, it may on other grounds not urged here, such as when the new evidence demonstrates actual innocence).

No evidentiary hearing is necessary with respect to the purported perjury claim. An evidentiary hearing is unnecessary because Raquel's allegation that she perjured herself, even if proved, would not entitle the Morales to relief.[93] At most, Morales is able to show that Raquel perjured herself in part, but makes no colorable showing of knowing use of perjured testimony. Given the evidentiary submissions by Morales, the district court did not abuse its discretion in denying an evidentiary hearing on whether the government knowingly presented perjured testimony.

D. The Jailhouse Informant

Morales argues that the government put another prisoner, Bruce Samuelson, in a cell diagonally opposite to his in segregation, and offered him leniency, in order to have Samuelson extract a confession from Morales. He argues that

92. *Id.* at 491-92.

93. *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir.1999).

he is entitled to the writ under *Massiah v. United States*[94] and *United States v. Henry*[95] because this interfered with his right to counsel.

In support of his motion for an evidentiary hearing, Morales submitted as evidence an interview that an assistant attorney general and his investigator had with Samuelson in 1993, eleven years after the trial, as the attorney general's office prepared for one of the habeas proceedings. But this evidence doesn't raise a colorable claim. Samuelson does not say that he was put into Morales's cell to extract admissions from Morales. To the contrary, Samuelson says that before or during the trial an "insinuation" was made to that effect, but it was "not the case at all." Samuelson states that the reason he was put in segregation was that he asked to be put there, so that he could avoid contact with the general prison population and have his own room where his things would be safe from theft. He got to talking with Morales because he was impressed with Morales's work as an artist.

Morales argues that Samuelson is demonstrably lying about this, because Samuelson says they spoke in Spanish, and Morales does not speak Spanish. But whether Samuelson is lying in his 1993 interview is not the question. Morales presents no evidence to demonstrate that the state planted Samuelson near him to get him to talk outside the presence of his attorney. On this record, the district court did not abuse its discretion in denying an evidentiary hearing on whether

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94. 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

95. 447 U.S. 264, 274, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

the state planted Samuelson.[96] That Samuelson bargained with what he had—information—for what he wanted—lenience—does not support an inference that he was planted to get such information.

E. Confrontation Clause

Morales argues that his constitutional right to confront witnesses against him was violated when the trial court allowed hearsay testimony from Rick Ortega's former girlfriend Christine Salaices. Christine testified that Rick had told her some months before the murder that Rick planned to stab Terri Winchell, and would bring Morales with him because "Mikey wouldn't let him stop." We need not decide whether allowing in this testimony violated the Confrontation Clause, because, even assuming that it did, that error would be harmless. Under *Brecht* the writ cannot be granted for constitutional trial error where, as here, the erroneously admitted testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict."[97]

AFFIRMED.

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96. *See Rich*, 187 F.3d at 1068.

97. *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710.

McKEOWN, *Circuit Judge*, concurring in part and dissenting in part:

The bedrock principles of our Eighth Amendment jurisprudence require that a state's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). California's scheme does not. The California lying-in-wait special circumstance, which triggers eligibility for the death penalty, has been expanded to such a degree that the line between premeditated murder and capital murder is but an illusory veil. To pass constitutional muster, a sentencing scheme must limit capital murders to a small realm within the universe of ordinary premeditated murders. But in California, like a Venn diagram of nearly overlapping circles, the confluence of lying-in-wait and other types of murder is virtually complete.

The Eighth Amendment analysis required in this challenge to the lying-in-wait provision confronts us with the intersection of a complex sentencing scheme and constitutional concepts that mean different things depending on the context. The questions raised in this appeal cannot be answered by a simplistic syllogism like "Not every ambush has to be from the bushes," maj. op. at 1178, any more than I would suggest one must be lying down to satisfy the lying-in-wait provision. Nor can they be resolved by applying less rigorous scrutiny taken from our Fifth Amendment precedent. Unfortunately, the majority does both. Although the majority recites the Eighth Amendment, it fails to apply the principal tenets of Eighth Amendment law. The Eighth Amendment requires that the lying-in-wait statute be narrowly construed

such that individuals statutorily eligible for the death penalty under the special circumstance—that is, those for whom the jury is even allowed to consider a death sentence—are sufficiently distinguishable from and comprise a significantly narrower class than other murder defendants. Applying the constitutionally mandated level of scrutiny, the California lying-in-wait provision fails.

Michael Morales was found guilty of two special circumstances that made him eligible for the death penalty: torture and lying-in-wait. This Court previously determined that the torture murder special circumstance failed to meet the requirements of the Eighth Amendment. *See Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir.1994) (holding that, in the absence of a narrowing construction, "the torture special circumstance would fail to provide a principled basis for distinguishing capital murder from any other murder"). I agree with the majority that the jury's consideration of the torture special circumstance, in the context of this case, was harmless under either a weighing or non-weighing scheme, as long as the lying-in-wait special circumstance is valid. The critical question, then, is whether the lying-in-wait special circumstance comports with the Eighth Amendment, as Morales's death sentence hinges on this special circumstance. This question is more difficult than the majority suggests, and ultimately I cannot agree with either the majority's analysis or its conclusions.

Although I originally concurred in the majority's opinion in full, upon conducting an Eighth Amendment-specific analysis, I can only conclude that the lying-in-wait special circumstance, as construed by California courts, is

insufficiently narrow to pass constitutional muster. California's three-prong test for the special circumstance has proven so permissive and penetrable that lying-in-wait murder is nearly indistinguishable from other murders. Upon reflection, and after considering Morales's petition for rehearing and rehearing en banc, along with the brief of amici curiae, I would grant Morales's habeas petition with respect to his sentence. I concur in the majority's opinion denying his petition on the remaining grounds.

I. FIFTH AMENDMENT VERSUS EIGHTH AMENDMENT ANALYSIS

My disagreement with the majority begins with its conflation of the specificity requirements of the Fifth and Eighth Amendments. In upholding his sentence of death, the majority answers Morales's Eighth Amendment challenge by concluding that the lying-in-wait special circumstance is constitutional because it does not apply to every defendant convicted of murder. *See* Maj. Op. at 1175. Although the inquiry under both amendments asks whether there is a meaningful distinction between those individuals that are eligible for the sentence and those that are not, the two inquiries are substantively dissimilar.

The Eighth Amendment demands that the death penalty not be administered in a way that is cruel and unusual. Towards this end, the criteria that make defendants eligible for the death penalty—which in California are termed "special circumstances"—must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the

defendant compared to others found guilty of murder." *Romano v. Oklahoma*, 512 U.S. 1, 7, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (quoting *Zant*, 462 U.S. at 877, 103 S.Ct. 2733). Eighth Amendment narrowing is also accomplished by the states' "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Thus, aggravating circumstances must not be unconstitutionally vague. *See Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

Although the Fifth Amendment also demands that laws not be unconstitutionally vague, the vagueness inquiry is not parallel to the Eighth Amendment analysis. Under the Fifth Amendment, due process is satisfied so long as "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Houston v. Roe*, 177 F.3d 901, 907 (9th Cir.1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

The difference between the constitutional inquiries applied under the Fifth and Eighth Amendments can be simply stated: the Fifth Amendment only looks for the existence of a line between the categories of murder, whereas under the Eighth Amendment, that line must be drawn in the right place—where capital murder is a small fraction of first degree murder. In other words, a void-for- vagueness challenge under the Due Process Clause asks whether the statutory language distinguishes among classes of murder so

that defendants have proper notice, whereas a challenge under the Eighth Amendment's cruel and unusual punishment clause asks whether the statute sufficiently narrows the application of the death penalty. *Compare Kolender*, 461 U.S. at 357, 103 S.Ct. 1855 (under due process, void-for-vagueness doctrine requires a penal statute to define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement) and *Houston*, 177 F.3d at 907 (with reference to a due process challenge, the "legislature and courts have created a thin but meaningfully distinguishable line") *with Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (under the Eighth Amendment, capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not).

The questions asked under the two Amendments make it easy to fall prey to mixing and matching the substantive analysis for each. Both look to see if the statutes or the state court's interpretations of the statutes meaningfully distinguish among classes of defendants so that the penalty is not imposed in an arbitrary and capricious manner. But while the two inquiries are linguistically similar, the phrase "meaningfully distinguish" assumes significantly different meanings under each analysis. By substituting one standard for the other, the majority fails to apply the proper scrutiny to the California lying-in-wait special circumstance.

Although the majority opinion does not cite to *Houston* in its Eighth Amendment analysis, the majority's reasoning

suggests a reliance on *Houston's* Fifth Amendment vagueness analysis when it attempts to demonstrate that the lying-in-wait special circumstance passes Eighth Amendment scrutiny simply because murder scenarios exist that would fall outside the lying-in-wait criteria. This reasoning misses the point of the Eighth Amendment requirement of narrowness. In *Houston*, we concluded that, for Fifth Amendment purposes, the difference between murder *while* lying in wait, under the special circumstance, and murder *by means of* lying in wait, under the first degree murder provision, constitutes "a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait." 177 F.3d at 907. The majority acknowledges that *Houston* did not consider an Eighth Amendment challenge, but nonetheless invokes the logic of *Houston* to uphold the constitutionality of this particular death eligibility criterion under the Eighth Amendment. This approach, although semantically smooth, is flawed.

Houston's Fifth Amendment analysis cannot be stretched so wide that it swallows Morales's Eighth Amendment claim. Although the majority is correct that Morales's *Fifth Amendment due process* argument is foreclosed by *Houston*, the *Houston* court never reached the *Eighth Amendment cruel and unusual punishment* question. Houston in fact lacked standing to bring such a challenge because he was not sentenced to death. *Id.* at 905. As *Houston* expressly acknowledged, a Fifth Amendment challenge to a death penalty sentencing scheme differs significantly from an Eighth Amendment challenge. *Id.* at 907-08 & n. 1. (declining to reach Eighth Amendment challenge to application of the death penalty but deciding Fifth Amendment void-for-vagueness challenge).

Appendix A

The Supreme Court's decision in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), illustrates the distinction between the levels of scrutiny under each challenge. In *Maynard*, the Court considered an Eighth Amendment challenge to Oklahoma's "especially heinous, atrocious, or cruel" statutory aggravating circumstance, which makes a defendant eligible for the death penalty. In its defense, the State argued that the statutory provision was not unconstitutionally vague because certain classes of convicted murderers would fall outside its definition. The Court rejected this approach: "The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment." *Id.* at 361, 108 S.Ct. 1853.

Here, the majority adopts the rationale rejected in *Maynard*. The majority posits that the California lying-in-wait special circumstance does not violate the Eighth Amendment because the special circumstance "embraces some first-degree murders, but not all." Maj. Op. at 1175. This rationale mistakes the Fifth Amendment for the Eighth Amendment and ignores the differences between the requirements of the two amendments. Although *Houston* found a "thin but meaningful distinction" with respect to the due process problem of notice, the due process bar is not only different but is also lower than what the Eighth Amendment requires under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny. That is, a statute may very well satisfy due process because adequate notice only demands that statutes distinguish crimes in a way that "embraces some . . . but not all." But the very

same statute would nonetheless fail to meet the requirements of the Cruel and Unusual Punishment Clause if it does not "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. 2733.

The majority's reliance on *Tuilaepa v. California* does not cure its problematic bootstrapping of the Fifth Amendment vagueness analysis. Despite the logical neatness with which the majority attempts to present the relationship among *Houston*, *Tuilaepa*, and the present case, the analysis is not parallel. *Tuilaepa* considered and rejected a narrowness challenge against jury discretion in sentencing a defendant to death during the penalty phase, not a narrowness challenge against eligibility for the death penalty. 512 U.S. at 980, 114 S.Ct. 2630. No special circumstance was at issue, and thus the case does not inform our understanding of what the Eighth Amendment requires with respect to death eligibility—the issue now before us.

Because the concept of narrowness is so crucial to proper Eighth Amendment scrutiny, as well as in distinguishing *Tuilaepa*, a few words of background are helpful. The Eighth Amendment requires that the types of conduct that render a defendant eligible for the death penalty must be sufficiently narrow to result in a significantly small subclass of murder defendants who qualify for death penalty consideration. This narrowing occurs at a stage known as "death eligibility." The Eighth Amendment also requires that the actual selection of the death penalty as punishment for an individual defendant must meet certain criteria, such as having proper

consideration of aggravating and mitigating circumstances. This narrowing occurs at a stage known as "death selection." Although the Eighth Amendment demands that capital sentencing schemes sufficiently narrow the possible application of the death penalty at both death eligibility and death selection, the concept of narrowness takes on different forms of analysis during the two stages.

At the first stage, eligibility for the death penalty must be restricted to a class of crimes in which death is a proportionate punishment. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 595-96, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty as punishment for rape unconstitutional). Eligibility for the death penalty is not a matter of juror discretion. "Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.' " *Tuilaepa*, 512 U.S. at 973, 114 S.Ct. 2630 (quoting *Arave v. Creech*, 507 U.S. 463, 471, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993)).

At the second stage, the Eighth Amendment requires the actual selection of the death penalty for a particular defendant be based upon an individualized determination directed to the individual and the circumstances of the crime. *See Lockett v. Ohio*, 438 U.S. 586, 601, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Because of the constitutional demand for greater consideration of the individual at the selection phase, state sentencing schemes must afford juries greater discretion in the selection phase than the eligibility phase. *See Tuilaepa*, 512 U.S. at 973, 114 S.Ct. 2630.

Thus, narrowing is achieved in different ways at the two stages, and as a result, analysis of death selection in *Tuilaepa* cannot serve as a substitute for the required analysis of death eligibility. Nor is the fact that a statute fulfills the requirements of due process, as in *Houston*, dispositive of whether it is sufficiently narrow to meet Eighth Amendment standards. It is thus improper to extend the "thin but meaningful" distinction of *Houston* and not separately analyze whether the lying-in-wait special circumstance is sufficiently narrow under the Eighth Amendment. I turn now to that analysis.

II. EIGHTH AMENDMENT ANALYSIS: DEATH ELIGIBILITY IN CALIFORNIA

Morales argues that the lying-in-wait special circumstance is unconstitutional under the Supreme Court's Eighth Amendment jurisprudence. I agree. The California Supreme Court's formulation of the limiting construction is so porous that it fails to strain out non-death eligible murders in a constitutionally meaningful way. *See People v. Morales*, 48 Cal.3d 527, 257 Cal.Rptr. 64, 770 P.2d 244 (1989).

A. SCOPE OF REVIEW

Review of an Eighth Amendment narrowing challenge is constrained by the Supreme Court's decision in *Arave v. Creech*. At issue in *Arave* was an Eighth Amendment challenge to Idaho's death penalty statute, which made a "cold-blooded, pitiless slayer" death eligible. The Court upheld the statute because the Idaho Supreme Court had adopted a limiting construction that satisfied constitutional requirements. *See Arave*, 507 U.S. at 471, 113 S.Ct. 1534.

In rejecting a claim that Idaho failed to apply its limiting construction consistently, the Court cautioned: "Under our precedents, a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether a limiting construction has been *applied* consistently." *Id.* at 477, 113 S.Ct. 1534 (emphasis in original). That is, a reviewing court may not consider a claim of unconstitutionality on the grounds that other defendants with similar circumstances did not receive like sentences. But it remains the ardent and unmitigated duty of a reviewing federal court to ensure that state courts construe death penalty sentencing schemes in consonance with the Constitution. *See, e.g., Sochor v. Florida*, 504 U.S. 527, 536-37, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

B. CALIFORNIA'S FORMULATION OF ITS LIMITING CONSTRUCTION

The California death penalty statute under which Morales was convicted provides that anyone found guilty of murder in the first degree shall be punished by death or life without parole if "the defendant intentionally killed the victim while lying in wait." Cal.Penal Code § 190.2(a)(15) (1989). The California Supreme Court applies a three-pronged limiting construction of the lying-in-wait special circumstance. Murder committed while lying-in-wait must contain the following elements: (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and, (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. *See People v. Morales*, 257 Cal.Rptr. 64, 770 P.2d at 260-61.

Yet, far from creating "a factual matrix sufficiently distinct from 'ordinary' premeditated murder," *id.* at 261, the lying-in-wait special circumstance reaches so far that it encompasses almost all lying-in-wait first degree murders, and as a result, also includes most premeditated murders. That is, there is virtually no line between premeditated murder and lying-in-wait first degree murder, and likewise virtually no line between lying-in-wait first degree murder and the special circumstance. Whereas the Constitution demands a funnel narrowing the pool of defendants eligible for the death penalty, California gives us a bucket. Indeed, the California Supreme Court has instructed that the lying-in-wait circumstance, as outlined in the standard jury instructions, is "the functional equivalent of proof of premeditation, deliberation and intent to kill." *People v. Ruiz*, 44 Cal.3d 589, 244 Cal.Rptr. 200, 749 P.2d 854, 867 (1988).[1]

1. The majority criticizes the reliance on cases that deal with lying-in-wait first degree murder as opposed to the lying-in-wait special circumstance, suggesting that the discussion in this section "relies on mistaken use of quotations and citations pulled out of context from some California cases." Maj. Op. at 1176. But as we and the California Supreme Court have noted before, the only discernable difference between the two lying-in-wait provisions was that the special circumstance requires the murder be committed "while" lying in wait—a distinction the California Legislature has since removed. *See Houston*, 177 F.3d at 907; *People v. Gutierrez*, 28 Cal.4th 1083, 124 Cal.Rptr.2d 373, 52 P.3d 572, 612-13 (2002). Thus, it is entirely appropriate to look at how California distinguishes between ordinary premeditated murder, lying-in-wait first degree murder, and the lying-in-wait special circumstance.

What the majority fails to acknowledge is that the divisions along this spectrum are indiscernible, and are certainly not the kind of

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The "concealment of purpose" prong has proven so malleable that it fails to narrow significantly the class of defendants eligible for the death penalty. And the "watching and waiting" prong, as construed by the California Supreme Court, makes it indistinguishable from any other premeditated murder. All that remains is the third prong, the "surprise" element, which, because of the way it has been interpreted, overlaps with the first prong. To me, a test in which almost anyone found guilty of premeditated murder satisfies all three parts is no test at all, and provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. 1759.

Ironically, the concealment prong, which by virtue of plain English adheres to the conventional and ordinary

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genuine narrowing required by the Eighth Amendment. Although, at the time Morales was convicted, the first degree murder provision and the special circumstance were separated by the paper-thin limiting construction that the murder occur "while" lying in wait, other prongs of the lying-in-wait test are identical. For example, in *People v. Edwards*, 54 Cal.3d 787, 1 Cal.Rptr.2d 696, 819 P.2d 436 (1991), which is a special circumstances case, the California Supreme Court held that there is no difference in the temporal requirement between the special circumstance and the first-degree murder provision. *Id.* at 474 n. 16. Indeed, the *Edwards* court relied on *People v. Ruiz*, 44 Cal.3d 589, 244 Cal.Rptr. 200, 749 P.2d 854 (1988), a lying-in-wait first degree murder case, to interpret the special circumstance provision. Considering that the California Supreme Court itself recognizes the interchangeableness of the two provisions, I see no reason why we should not look to lying-in-wait first degree murder cases for California's construction of the same prongs in the special circumstance.

understanding of lying-in-wait as ambush, *see e.g.*, *People v. Merkouris*, 46 Cal.2d 540, 297 P.2d 999, 1011-12 (1956), has been expanded rather than narrowed by the California courts. Instead of the traditional rule that lying-in-wait requires evidence of physical concealment or surprise, California has no definitive requirement for actual physical concealment. *See Morales*, 257 Cal.Rptr. 64, 770 P.2d at 259 ("[T]he concealment element 'may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares *even though he sees his murderer.*' ") (emphasis in original); *see also People v. Sutic*, 41 Cal.2d 483, 261 P.2d 241, 245-46 (1953) (concealment in ambush unnecessary). Rather, the concealment portion of the lying-in-wait test is satisfied by the concealment of purpose, not physical concealment. *See Morales*, 257 Cal.Rptr. 64, 770 P.2d at 259; *see also People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16, 21 (1947). Thus, the cases preceding *Morales* established that the concealment criterion extended to more than mere ambush, as the term is commonly understood. Concealment, it turns out, can sometimes mean no more than a murderer's failure to announce his intentions or a desire to conceal the murderous plan from the victim. What, then, is the difference between concealment and surprise?

But even concealment of purpose is not always necessary, as subsequent cases demonstrate. In *People v. Hillhouse*, the California Supreme Court held that a defendant could be death eligible under the lying-in-wait special circumstance despite the fact that he announced his purpose to his victim, stating "I ought to kill you" prior to committing the murder. 27 Cal.4th 469, 117 Cal.Rptr.2d 45, 40 P.3d 754, 775 (2002). Under this recent iteration of the rule, criminal defendants

meet the concealment test regardless of whether they are hidden or seen, and even whether they conceal their intentions or reveal them. Thus, rather than curing the overbreadth of the first part of the lying-in-wait test, subsequent cases manifest the same if not more problematic infirmities than those that existed before Morales's case.

The second element of the limiting construction is even more permeable than the first. California requires "a substantial period of watching and waiting for an opportune time to act."[2] *People v. Morales*, 257 Cal.Rptr. 64, 770 P.2d at 261. The paradigmatic understanding of watching and waiting would require—as the term suggests—an actual period of time spent waiting. Although imposing a specific quantum of time may prove both unnecessary and impractical, the Eighth Amendment requires death eligibility factors to include at least some means of distinguishing death penalty cases from others.

Despite the need to distinguish cases eligible for the death penalty, the California Supreme Court has consistently construed the temporal requirement of the lying-in-wait circumstance to be no more than that of ordinary premeditated or deliberate murder. Thus, in *People v. Ruiz*, 244 Cal.Rptr.

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2. Even the "watchful and waiting" element—perhaps the essence of lying-in-wait—has failed to restrain the applicability of the special circumstance. A defendant need not actually watch the victim, as long as he is watchful, or "alert and vigilant," while waiting. *See People v. Sims*, 5 Cal.4th 405, 20 Cal.Rptr.2d 537, 853 P.2d 992, 1007-08 (1993). Yet, paradoxically, a defendant can be "alert and vigilant" even if he falls asleep while waiting for his intended victim. *See People v. Tuthill*, 187 P.2d at 21.

200, 749 P.2d at 866 n. 3, the court reaffirmed the constitutionality of the lying-in-wait murder provision: "The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." The formulation is the same for the lying-in-wait special circumstance. *See Edwards*, 1 Cal.Rptr.2d 696, 819 P.2d at 474 n. 16. Indeed, this broad construction of the "watching and waiting" requirement is identical to the definition of lying-in-wait given in the standard jury instruction at the time of Morales's conviction.[3]

Both the standard jury instructions regarding the lying-in-wait special circumstance and the California court's construction of the test lead to the conclusion that any premeditated or deliberate murder would satisfy the watching and waiting requirement. Under such a construction, the second part of the so-called limiting construction is without any limiting parameters.

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3. The standard jury instructions for the lying-in-wait special circumstance explicitly incorporates by definition the instructions for lying-in-wait murder. *See* CALJIC 8.81.15. Those instructions read:

> The term 'lying-in-wait' is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

CALJIC 8.25 (West 4th Rev. Ed.1979).

The third and final element of California's three-part test requires the defendant to attack by surprise from a position of advantage. The California Supreme Court held that Morales satisfies this prong of the limiting construction because he was sitting behind the victim in a car. Under the loose construction of the first and second parts of the lying-in-wait test, Morales's eligibility for the death-penalty ultimately turns on whether he killed his victim by surprise. That is, even after a jury applies the first and second parts of the lying-in-wait test, the question of surprise is all that remains as a truly narrowing factor. And yet, taking a page from the California courts' book on concealment, surprise apparently can be nothing more than concealment of purpose. Standing alone, I fail to see how this singular factor significantly narrows the pool of defendants eligible for the death penalty, and for that reason, it is not a proper litmus test for death eligibility under the Eighth Amendment.

The majority provides examples of cases in which the lying-in-wait special circumstance would not apply, and suggests that the scheme is overbroad only if "unimaginative" about the way murders are committed. Maj. Op. at 1176. I do not dispute that, with imagination and creativity, one can explain away the constitutional infirmities of the California death penalty. But that is beside the point. Under the Eighth Amendment, it is not enough that a death penalty statute applies to some but not all murder defendants. Rather, the inquiry is whether the statute is narrow enough-whether the subclass of death eligible defendants is sufficiently smaller than the overall class of murder defendants. *See Maynard*, 486 U.S. at 361, 108 S.Ct. 1853. The majority's litany of examples underscores precisely the way in which

the majority misconstrues the Eighth Amendment inquiry. By applying Fifth Amendment scrutiny to Morales's Eighth Amendment challenge, the majority is able to sidestep the long reach of California's construction of the lying-in-wait provision.

Under the California Supreme Court's broad interpretation, it is difficult to see how the limiting construction selects those more deserving of the ultimate punishment. *See Zant*, 462 U.S. at 877, 103 S.Ct. 2733. To the extent that the special circumstance can be said to limit death eligibility, it does so in an arbitrary and capricious manner. *See Godfrey*, 446 U.S. at 428, 100 S.Ct. 1759. The lying-in-wait special circumstance has expanded so far beyond a constitutional foundation that it collapses under its own volume. Indeed, several commentators have underscored the infirmity of the California scheme. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283 (1997); Garth A. Osterman & Colleen Wilcox Heidenreich, Note, *Lying in Wait: A General Circumstance*, 30 U.S.F. L.Rev. 1249 (1996). And in benchmarking the breadth of the scheme, it is useful to reference the words of one of our colleagues: "The majority must come to realize . . . [i]ncreasing the number of crimes punishable by death, widening the circumstances under which death may be imposed . . . will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society . . . are put to death." Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 29 (1995).

Appendix A

Absent proper limiting by the California courts, the lying-in-wait special circumstance does not survive Eighth Amendment scrutiny because it fails to narrow sufficiently the class of people eligible for the death penalty. For these reasons, I respectfully dissent with respect to the determination of death penalty eligibility.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 16, 21, AND 22 DATED OCTOBER 19, 1998 AND ENTERED OCTOBER 21, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 91-0682-DT

DEATH PENALTY CASE

MICHAEL ANGELO MORALES,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 16, 21, AND 22 DATED OCTOBER 19, 1998

Introduction

The factual and procedural history of this case is described in the Court's Order of September 28, 1998, and need not be repeated here.

Appendix B

Currently pending before the Court are two motions for partial summary judgment filed by petitioner Michael Angelo Morales. These motions address aspects of petitioner's conviction arising from the State's charge that petitioner murdered his victim, Terri Winchell, by lying in wait and then torturing her.

The State of California has defined first degree murder to include premeditated murder, murder perpetrated by means of lying in wait, and murder perpetrated by torture. Cal. Penal Code § 189. The jury in Morales's case was instructed on these three separate theories of murder. (3 C.T. 627-34.) The jury found Morales guilty of first degree murder and also expressly found that the murder was premeditated. The verdict forms did not require the jury to state its conclusions concerning torture murder or murder by lying in wait. (3 C.T. 683-84.)

Under California law, the penalty for first degree murder in which one or more of certain enumerated special circumstances is found true is either the death penalty or life imprisonment without the possibility of parole. Cal. Penal Code § 190.2. In this case, the jury found true the special circumstance allegation that Morales intentionally killed Winchell "while lying in wait, within the meaning of Penal Code Section 190.2(a) (15)." (3 C.T. 686.) The jury also found true the special circumstance allegation that "the murder was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a) (18)." (3 C.T. 687.)

Appendix B

On August 28, 1998, Morales filed a motion for partial summary judgment on Claim 21 of his First Amended Petition, which alleges that California's lying-in-wait special circumstance was unconstitutionally applied in his case. (Pet. at 110-11.) Respondent filed an opposition on September 14, 1998, and Morales filed a reply on October 8, 1998.

On September 14, 1998, Morales filed a motion for partial summary judgment on Claims 16 and 22 of his petition. Claim 16 alleges that the evidence introduced at trial was insufficient to support a finding of first degree torture murder or to establish the truth of the torture-murder special circumstance. (Pet. at 93-95.) Claim 22 alleges that the evidence introduced at trial was insufficient to support a finding of first degree murder by lying in wait or to establish the truth of the lying-in-wait special circumstance. (Pet. at 111-13.) Respondent filed an opposition to this motion on October 2, 1998. No reply was filed.

There are no disputed factual issues that preclude resolution of the merits of Claims 16, 21, and 22 as a matter of law, on the basis of the state court record previously lodged with the Court and the pleadings on file in this case.

Discussion

1. *Claim 16*

Claim 16 asserts that the evidence at trial was insufficient to prove that Morales tortured Terri Winchell in the process of killing her. (Pet. at 93-95.) Under California law, first degree torture murder is "murder committed with a wilful,

deliberate and premeditated intent to inflict extreme and prolonged pain." *People v. Pensinger*, 52 Cal. 3d 1210, 1239 (1991) (citation and internal quotation marks omitted) . The torture-murder special circumstance also requires proof of an intent to inflict extreme pain, although it is not necessary that the pain be prolonged. *People v. Davenport*, 41 Cal. 3d 247, 268-71 (1985).

At trial, Morales argued to the jury that there was insufficient evidence to conclude beyond a reasonable doubt that he intended to inflict severe pain on Terri Winchell, and accordingly that the jury should find him not guilty of torture murder and should reject the torture-murder special circumstance allegation. (12 R.T. 2643-47.) Morales repeats this argument here, urging this Court to conclude that although Winchell evidently died a painful death, this was simply a result of the cumbersome methods that Morales employed in killing her, not the result of any specific intent to cause her suffering by inflicting severe pain.

The Due Process Clause of the Fourteenth Amendment prohibits a state from convicting a defendant of a crime without first presenting to an impartial trier of fact "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). On federal habeas review, this Court must determine whether the record evidence in Morales's trial "could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The Court must also review the evidence to determine whether it is constitutionally sufficient to support the jury's conclusion that the special circumstance

allegations are true. *See Lewis v. Jeffers*, 497 U.S. 764, 781-82 (1990).

In determining whether the evidence is sufficient to establish beyond a reasonable doubt that Morales harbored the requisite intent to torture his victim, this Court must not substitute its own view of the strength of the evidence for the jury's independent assessment. *United States v. Enriquez Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993). Determining whether due process was satisfied in this case "does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318-19. "Instead, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The State of California is not required to prove its case against Morales twice: once to a state court jury and once to a federal judge. Accordingly, "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Id.* It is the responsibility of the jury, not of this Court, "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

The jury in this case listened to witnesses who testified about Morales's many statements describing the details of the crime, including his statement before the attack that he was going to "hurt this girl" in order to do his cousin Rick

Ortega a favor. (10 R.T. 2051-52.) The jury also considered the physical evidence of the victim's many injuries, inflicted by several different methods over a sustained period of time. On federal review of the sufficiency of this evidence to sustain the jury's implied finding of intent to torture, this evidence "must be viewed in a light most favorable to the government, and the government remains entitled to all reasonable inferences which may be drawn therefrom." *United States v. Cuevas*, 847 F.2d 1417, 1421 (9th Cir. 1988) (citation omitted). Morales complains that his out-of-court admissions show at most an intent to kill, not an intent to torture. But the prosecution was not required to prove the defendant's mental state with evidence that he personally admitted that he intended to inflict severe pain. "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." *United States v. Lennick*, 18 F.3d 814, 820 (9th Cir. 1994).

Morales makes much of the fact that the trial judge in this case expressed doubt about the sufficiency of the evidence of intent to torture, and granted a judgment n.o.v. as to the jury's implied torture-murder finding. *See People v. Morales*, 48 Cal. 3d 527, 560 (1989) . The California Supreme Court set aside the judgment n.o.v. because such a procedural mechanism is unavailable in criminal trials. *Id.* at 560-61. However, the fact that the trial judge may have viewed the evidence differently from the jury has no bearing on the question before this Court, which is simply whether "*any* rational trier of fact" could have found beyond a reasonable doubt, on the basis of the evidence introduced at trial, that Morales intended to inflict severe pain on Terri Winchell. *Jackson*, 443 U.S. at 319.

In analyzing this claim, the California Supreme Court recognized that "the evidence in the present case was somewhat ambiguous concerning the defendant's intent" to inflict extreme and prolonged pain. *People v. Morales*, 48 Cal. 3d at 560. Certainly, the evidence of intent to torture was not as overwhelming as the evidence of intent to kill. Nevertheless, the relevant inquiry is not whether the evidence is compatible only with an intent to torture, but whether the jury could reasonably adopt the prosecution's interpretation of the facts. *See United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991).

Resolving credibility determinations in the State's favor, and viewing all the evidence in the light most favorable to the prosecution, *Jackson*, 443 U.S. at 318-19, a reasonable factfinder could have evaluated the question of Morales's intent to inflict severe and prolonged pain against the backdrop of the following sequence of events. When Morales left the apartment shortly before attacking Terri Winchell, he took with him a knife, a hammer, and a belt. He had practiced using the belt to strangle someone the previous day. Morales knew that Winchell had been saying that his cousin Rick Ortega was gay, and he wanted to help his cousin exact revenge by hurting her. The two men drove Winchell to an isolated area, so that no one could hear her scream. Morales placed the belt around Winchell's throat and pulled so forcefully that the belt broke. He then began to beat Winchell severely with the hammer all over her head. Winchell was screaming in pain and attempting to protect herself with her hands. She sustained many injuries to her arms and hands, and did not lose consciousness for some time. Even though Morales had a knife, he deliberately chose not to use it at

this point to kill Winchell. Instead, he kept hitting her with the hammer. He then dragged her face-down across the asphalt road and into a field, where he raped her, not wanting to let a sexual opportunity go to waste. Only after completing all of these acts did Morales use the knife to inflict four stab wounds, in an effort to make sure that she was dead.

On the basis of this evidence, a rational trier of fact could conclude that Morales was motivated by a desire to exact revenge, and could conclude that the manner in which he orchestrated his attack on Terri Winchell proved beyond a reasonable doubt that he intended not just to kill her, but also to inflict severe and prolonged pain on her before she died. This evidence is therefore legally sufficient under the Due Process Clause of the Fourteenth Amendment to sustain the jury's implied finding of intent to torture.

2. *Claim 21*

Claim 21 challenges the constitutionality of the jury instruction defining the lying-in-wait special circumstance. (Pet. at 110-11.) The jury was instructed that lying in wait requires proof of three elements in addition to intent to kill: "waiting, watching, and concealment." (3 C.T. 651-52.) Concealment was further defined as follows:

> The element of concealment which is required in lying in wait may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer.

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> While concealment is an element necessary before lying in wait can be applied, it is only a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise.

(3 C.T. 653.) On direct appeal, the California Supreme Court affirmed that these instructions accurately define the lying-in-wait special circumstance under California law. *People v. Morales*, 48 Cal. 3d at 553-57.

Morales alleges that lying-in-wait has historically been interpreted to require proof of physical concealment. He argues that if it also applies to murderers who conceal only their purpose from their victims, this expands the category of murderers who are subject to the death penalty under California law to such a degree that the result is an unconstitutionally broad and arbitrary classification.

To withstand scrutiny under the Eighth and Fourteenth Amendments of the United States Constitution, a state's death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Accordingly, before a criminal defendant may be found eligible to receive the death penalty, the jury "must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The "special circumstances" enumerated in

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California Penal Code § 190.2, which specify which murderers are eligible for the death penalty, perform the equivalent function of the "aggravating circumstances" referred to in *Tuilaepa*. *See id.* at 975.

To adequately narrow the class of murderers subject to the death penalty, a special circumstance must meet two requirements. *Id.* at 972. "First, the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." *Id*; *Arave v. Creech*, 507 U.S. 463, 474 (1993). "Second, the [special circumstance] may not be unconstitutionally vague." *Tuilaepa*, 512 U.S. at 972. Morales does not challenge the lying-in-wait special circumstance on vagueness grounds; instead, he alleges that it does not adequately narrow the class of death-eligible murderers because (1) it applies to an "enormous" class of defendants which includes "virtually any intentional, first-degree murder," and (2) to the extent that it differentiates between murderers, there is no "principled basis" for the distinction it draws.

The California Supreme Court rejected petitioner's challenge to the constitutionality of a lying-in-wait special circumstance that does not require proof of physical concealment. *People v. Morales*, 48 Cal. 3d at 557. The state court explained:

> [We] do not mean to suggest that a mere concealment of purpose is sufficient to establish lying in wait-many "routine" murders are accomplished by such means, and the constitutional considerations raised by defendant

> might well prevent treating the commission of such murders as a special circumstance justifying the death penalty. But we believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

Id. This Court agrees. In his discussion, Morales artificially separates the three elements of the lying-in-wait special circumstance, and then argues that each one considered in isolation fails to genuinely narrow the class of death-eligible murderers under California law. But these three elements are not separate special circumstances, each required to satisfy the demands of the Eighth Amendment. Instead, the special circumstance must be considered as a whole.

As the California Supreme Court recognized, "[t]he question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." *Id.* at 557-58. To fit within the definition, the murderer must first engage in "a substantial period of watching and waiting for an opportune time to act," all the while concealing his true purpose from his intended victim. *See id.* at 557. *Immediately after* this substantial period of waiting, he must launch a surprise attack on the unsuspecting victim, and the attack

must be made "from a position of advantage." *Id.* The failure of any one of these several conditions, such as the lack of an advantageous position, a short waiting period, or premature discovery by the victim of the murderer's purpose, would remove the murder from the ambit of the special circumstance. Therefore, California's lying-in-wait special circumstance does not apply to every murder defendant. *Cf. Arave v. Creech*, 507 U.S. at 474 (aggravating circumstance that "applies to *every* defendant eligible for the death penalty" would be constitutionally infirm).

Although Morales complains that the lying-in-wait special circumstance applies to many more defendants than would a circumstance defined to require physical concealment, this does not establish that it fails to perform an adequate narrowing function. Contrary to petitioner's implication, the Eighth Amendment does not require the states to restrict the death penalty to only a small subset of intentional murderers. In *Arave v. Creech*, the defendant challenged the constitutionality of an aggravating circumstance that the Idaho courts had defined to apply to any first degree murderer who was a "cold-blooded, pitiless slayer." *Id.* at 468-73. Even though this aggravating circumstance applied to many murderers, the Supreme Court held that because "not all Idaho capital defendants are 'cold-blooded,'" and "some" exhibit feeling, Idaho "has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id.* at 475-76. As defined by the state Supreme Court, California's lying-in-wait special circumstance also narrows in a meaningful way the class of first degree murderers who are eligible to receive the death penalty.

Petitioner also claims that this special circumstance arbitrarily and irrationally distinguishes between murderers who lie in wait in the manner described by the California Supreme Court, and those who do not. However, petitioner fails to explain why the State of California is precluded by the federal constitution from deciding that some kinds of first degree murders are worse than others. Petitioner's citation to *United States v. Cheely*, 36 F.3d 1439 (9th Cir. 1994) is inapposite. The federal statute found unconstitutional in *Cheely* authorized the death penalty for anyone who caused a death by transmitting explosive or inflammable material through the mail with an intent to damage property. *Id.* at 1443. The Court of Appeals concluded that the statute inadequately narrowed the class of death-eligible defendants, because the death penalty could be applied to "a broad class, composed of persons of many different levels of culpability," including people who were guilty only of involuntary manslaughter. *See id.* at 1443-45. In contrast, California's lying-in-wait special circumstance requires proof of intent to kill, and is applicable only to those who are found guilty of first degree murder as it is independently defined by California Penal Code § 189. It therefore performs its narrowing function within a class of highly culpable murderers, unlike the statute at issue in *Cheely*.

The People of the State of California, and the California Supreme Court, have concluded that "an intentional murder undertaken by lying in wait . . . is properly among the kinds of aggravated killing which justify society's most severe penalty." *People v. Morales*, 48 Cal. 3d at 557-58. Petitioner offers no support for his assertion that the federal courts have

the constitutional authority to review the merits of such an ultimate policy decision made by the State. The Eighth Amendment imposes two requirements on the states for the imposition of capital punishment. "First, States must properly establish a threshold below which the death penalty cannot be imposed." *Romano v. Oklahoma*, 512 U.S. 1, 6 (1994). "To ensure that this threshold is met, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Id* at 7 (citation and internal quotation marks omitted). "[A] State's sentencing procedure must suitably direct and limit the decisionmaker's discretion so as to minimize the risk of wholly arbitrary and capricious action." *Id.* (citation and internal quotation marks omitted). "Second, States must ensure that capital sentencing decisions rest on an individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are considered." *Id.* (citation and internal quotation marks omitted). Apart from these two requirements, however, the States are entitled to the traditional latitude they enjoy to define their own substantive criminal laws, procedures, and appropriate punishments. *Id.* The State of California has rationally selected for more severe punishment a murderer who, concealing his purpose from his intended victim, watches the victim and waits for a substantial period of time until the opportunity presents itself to attack from a position of advantage. This policy choice does not offend the federal constitution.

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3. *Claim 22*

Claim 22 challenges the sufficiency of the evidence to show that Morales lay in wait to kill his victim. (Pet. at 111-13.) Like Claim 16, this claim must be evaluated under the standard described in *Jackson v. Virginia*, which requires this Court to ask "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

This claim addresses both the theory of first degree murder by means of lying in wait, and the lying-in-wait special circumstance. In their briefing, the parties have not distinguished these two different forms of lying-in-wait, and it is unnecessary to do so here. If the evidence is sufficient to sustain the special circumstance finding in this case, then it is also sufficient to support a conviction of first degree murder by means of lying in wait. *See Calderon v. Prunty*, 59 F.3d 1005, 1008-1009 (9th Cir. 1995) (describing two types of lying in wait under California law).

As discussed in connection with Claim 21, to qualify as a lying-in-wait murder, there had to be "a substantial period of watching and waiting for an opportune time to act," during which the defendant concealed his purpose from the victim, before the physical attack began. *See People v. Morales*, 48 Cal. 3d at 557. Morales complains that the prosecution presented no evidence of what transpired in the car prior to the attack, and argues that therefore the evidence was insufficient to establish beyond a reasonable doubt all the elements of a lying-in-wait murder. This overlooks Bruce

Samuelson's testimony about the car ride from Stockton to a remote area before the attack commenced. (11 R.T. 2336-37.) More fundamentally, however, petitioner's argument overlooks the fact that "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." *Lennick*, 18 F.3d at 820. On review for constitutional sufficiency, the evidence must be viewed "in the light most favorable to the prosecution," and the prosecution is entitled to all reasonable inferences from the evidence. *Jackson*, 443 U.s. at 319; *Cuevas*, 847 F.2d at 1421.

There was ample evidence that Morales sat in RIck Ortega's car in the seat directly behind Terri Winchell for the substantial period of time that it took to drive from Patricia Flores's house, through Stockton, and out of town on the road towards Lodi. From this position, it would have been difficult for Morales to avoid watching Winchell, even if he had wanted to. During the car ride, Morales had the knife, the hammer, and the belt with him in the back seat, and he possessed the intention to hurt and kill Winchell. It is reasonable to infer that Morales concealed his weapons from Winchell, since he had concealed them before leaving the house. (Neither Flores nor Cardenas saw him take the murder weapons with him.) It is equally reasonable to infer that Morales concealed his purpose from Winchell at least for the period of time necessary to drive out of town, since his reason for leaving town was to "avoid detection." (11 R.T. 2337.) Even if the two men began berating Winchell immediately upon entering the car, for the statements she was making about Ortega and for dating Ortega's boyfriend, it is extremely unlikely that they revealed the ultimate purpose of their trip until after they had arrived in a remote

area "out of earshot or hearing distance from anybody else." (11 R.T. 2336-37.) If they wanted no one to hear Winchell scream, or see her struggle or try to escape, then they would not have revealed their plans to her in the middle of Stockton. Finally, by his own admission (introduced through Samuelson's testimony), Morales waited for "an opportune time to act," 48 Cal. 3d at 557, by delaying the attack until after the car was "out of earshot" in order to "avoid detection." (11 R.T. 2336-37.)

To prove a lying-in-wait murder, the prosecution also had to establish that after watching and waiting for an opportune moment, Morales took Winchell by surprise and attacked her "from a position of advantage." *People v. Morales*, 48 Cal. 3d at 557. There is evidence that Winchell was surprised by the attack: when it began, she screamed for Ortega to help her. The seat behind Winchell in the moving car was obviously a position of advantage for Morales, because Winchell could not escape and could not easily ward off the blows directed at her head. It was also an advantageous position from which to initiate a surprise strangling, as Morales well understood. The day before the murder, he had practiced the attack by approaching Patricia Flores from behind while she was seated in a chair. He threw a belt around her neck and "tightened it up a little bit." (10 R.T. 2212-13.) Presented with all this evidence and drawing reasonable inferences, a rational jury could have found the essential elements of the lying-in-wait special circumstance beyond a reasonable doubt.

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Conclusion

For the foregoing reasons, the Court hereby **DENIES** petitioner's motions for partial summary judgment, and **DENIES** Claims 16, 21, and 22 of the First Amended Petition on the merits.

Petitioner's remaining claims to be decided by this Court are: 20, 23, 43, 44, 45, 48, 49, 51, 52, 53, 54, 56, 57, and 58. A schedule for briefing and argument on these claims was established in the Court's Order of October 9, 1998.

IT IS SO ORDERED.

Dated: OCT 19 1998

s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT DATED JULY 18, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 91-0682-DT

MICHAEL ANGELO MORALES,

Petitioner,

vs.

ARTHUR CALDERON, Warden of
San Quentin State Prison,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Background

On April 7, 1983, petitioner Michael Morales ("Morales") was convicted of conspiracy to commit murder, California Penal Code section 182; murder, California Penal Code section 187; and forcible rape, California Penal Code section 261.2. The scenario leading to the victim's death, as presented by the prosecution, was that the petitioner had attempted to strangle the victim, Ten Winchell with his belt. However, when the belt was broken, Morales had attempted

to kill the victim by repeatedly striking her on the head with a hammer. Ultimately, Morales killed his victim by stabbing her four times in the chest.

On April 25, 1983, after a penalty trial, the same jury found that the aggravating factors outweighed the mitigating factors and returned a death verdict.

On June 14, 1983, petitioner received a sentence of death regarding the murder conviction. The California Supreme Court affirmed petitioner's conviction and sentence, with two justices dissenting, on June 1, 1989. *People v. Morales*, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (1989).

On July 20, 1992, petitioner filed a petition for writ of habeas corpus in this Court, pursuant to 28 U.S.C. § 2254, asserting 53 claims in support thereof. On September 28, 1992, respondent filed a motion to dismiss the petition. On November 16, 1992, respondent's motion was granted in part and denied in part. This Court determined that 33 of petitioner's 53 claims had yet to be exhausted by fairly presenting them to the state's highest court. Therefore, this Court ordered that the 33 unexhausted claims be dismissed without prejudice, while retaining jurisdiction over the 20 exhausted claims. This Court directed respondent to file an answer on the 20 remaining claims within 30 days.

On December 16, 1992, petitioner filed a petition for writ of habeas corpus in the California Supreme Court on the 33 unexhausted claims.

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On December 17, 1992, this Court granted respondent's application for an order extending time to file an answer to December 24, 1992. On December 28, 1992, respondent filed an answer to the 20 remaining claims in the petition for writ of habeas corpus and a memorandum of points and authorities in support thereof, which petitioner moved to strike as ambiguous and untimely. On February 22, 1992, this Court denied petitioner's motion to strike. Petitioner's motion to disqualify the Attorney General of the State of California and the District Attorney of San Joaquin County was denied on March 8, 1993.

In April, 1993, petitioner filed a "supplemental" petition for writ of habeas corpus.

On July 28, 1993, the California Supreme Court denied petitioner's two habeas corpus petitions in separate identical orders that read:

> "Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal. 3d 391, 396, fn.1.)
>
> Mosk, J. is of the opinion that an order to show cause should issue."

On January 14, 1994, petitioner filed a first amended petition for writ of habeas corpus. This amended petition raises 37 claims that were raised in the California Supreme Court in the December 1992 and April 1993 habeas corpus

petitions. The amended petition also contains 2 claims, which contain 4 subclaims, that have never been presented by petitioner to any state or federal court. The amended petition also realleges the 20 claims from petitioner's first petition for writ of habeas corpus that have already been answered by respondent and traversed by petitioner.

On March 14, 1994, respondent filed a motion to dismiss the entire first amended petition for writ of habeas corpus.

On April 11, 1994, respondent's motion to dismiss petitioner's first amended petition for writ of habeas corpus came on for hearing. On that date, this Court granted respondent's motion to dismiss the first amended petition for writ of habeas corpus. This order was entered on April 29, 1994.

On June 16, 1994, petitioner filed a Motion for Partial Summary Judgment. This motion is presently before this Court.

Discussion

A. Standard

In deciding motions for summary judgment, this Court follows Federal Rule of Civil Procedure 56(c) and the following cases: *Celotex Corp. v. Catrett*, 477 U.S. 317, 322; 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct 2505, 2514, 91 L. Ed. 2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348,

1356, 89 L. Ed. 2d 538 (1986); *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *California Building Products. Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir. 1978).

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. Fed. R. Civ. P. 56(e). However, no defense to an insufficient showing is required. *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir. 1978)

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 477 U.S. at 250-

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51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *California Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

B. Petitioner's Motion for Partial Summary Judgment

Petitioner maintains that the trial court's jury instructions pertaining to torture murder special circumstances failed to satisfy the requirements set forth in the 6th, 8th, and 14th Amendments to the United States Constitution.

The petition for writ of habeas corpus alleges a 6th Amendment violation based on the theory that the failure to instruct the jury on the torture-murder special circumstance allegation on "the intent to inflict extreme pain" reduced the prosecution's burden of proof with respect to that element of the special circumstance and denied him a jury trial with respect to that element of the special circumstance.

The writ alleges its second Constitutional violation based on petitioner's claim that the failure to properly instruct the jury as to the requisite elements of the torture-murder special circumstance violates the 8th Amendment's requirement that there be a principled basis for distinguishing capital murder from any other murder.

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Lastly, petitioner contends that he has suffered a Fourteenth Amendment violation at the hands of the government.

Respondent contends that the aforementioned jury instructions were correctly worded, and that it satisfies the requirements of the 6th, 8th, and 14th amendments.

In this Court's opinion, the law does not support petitioner's motion for partial summary judgment. In order to fully discuss petitioner's contentions that these instructions violated the petitioner's constitutional claims, this Court will review petitioner's individual claims.

1. This Court Does Not Find That Petitioner Has Been Denied His Eighth Amendment Rights.

The Eighth Amendment of the United States Constitution imposes two requirements on the states for the imposition of capital punishment. The first of these requirements is that the statutory scheme, through which the death penalty is imposed, must first rationally narrow the class of defendants upon whom the death penalty may be imposed. Once the narrowing function has taken place, the Eighth Amendment further requires that the defendant be allowed to place before the sentencing authority any evidence related to the offense or the offender that may serve as a basis for a sentence less than death. *Romano v. Oklahoma*, __ U.S. __ , [94 Daily Journal D.A.R. 8088, 8089 (1994)].

Apart from these two requirements, the Eighth Amendment does not impose any substantive requirements

on the states except that the class of death-eligible defendants must include those who kill, who attempt to kill, who intend to kill, intend to use lethal force, or who demonstrate reckless indifference to life and play a major role in a felony murder. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986); *Tison v. Arizona*, 484 U.S. 137, 107 S.Ct. 1676, 95 L. Ed. 127 (1987). Beyond these requirements, the states are entitled to the traditional latitude they enjoy to define their own substantive criminal laws, procedures, and the punishment. *Romano, supra*, at p. 8089.

In *Arave v. Creech*, __ U.S. __, 113 S. Ct. 1534, 123 L. Ed. 2d 188, 198 (1993), the United States Supreme Court reaffirmed the two-part Eighth Amendment standard for determining whether a capital sentencing scheme suitably directs a sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious sentencing decisions. The statutory scheme must first limit the sentencer's discretion by clear and objective standards that provide the sentencing body "some guidance." *Id.* The scheme must also narrow the class of death eligible defendants in a meaningful way. *Id.*

As to the first requirements, the Court in *Arave* found that the Idaho statutory aggravating circumstance of a "cold blooded" or "pitiless" killer provided a clear and objective standard for providing sentencers under Idaho's capital sentencing scheme some guidance under the Eighth Amendment. In rejecting the argument that the phrase "cold blooded, pitiless slayer" was "without content," the Court relied on the *Webster's Dictionary* definition of both "cold blooded" and "pitiless." 123 S. Ct. at 198-199. Based on such

ordinary usage, the Court found that these two terms referred to one who "kills without feeling or sympathy." *Id.* at 199.

Using an analysis similar to the Court in *Arave*, the ordinary usage of the term "torture" governs the analysis in this case and such ordinary usage necessarily embodies an intent to inflict extreme pain. The dictionary definition of torture describes it as "the infliction of intense pain . . . to punish or coerce someone; torment or agony induced to penalize . . , to extort . . ., or to give sadistic pleasure to the torturer." *Webster's Third New International Dictionary* 2414 (1976). Using this definition, this Court does not find a constitutional problem stemming from the Eighth Amendment.

The Eighth Amendment's additional requirement of narrowing the class of death eligible defendants, turns on whether "a sentencing judge reasonably could find that not all [California] capital defendants" intend to inflict extreme pain, and, in fact, actually inflict extreme pain upon their murder victims. *Arave v. Creech*, 123 L. Ed. 2d at 201. If the statutory scheme "has identified . . . [a] subclass of defendants . . . as more deserving of death" and "some within the broad class of first degree murderers fall outside that subclass", the statutory scheme "has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id.* This Court does not doubt that the torture-murder, "intent to inflict extreme pain", subclass separates itself from the class of first degree murders in a meaningful way.

Appendix C

Furthermore, this Court is not persuaded by the petitioner's reliance on the decision of *Wade v. Calderon*, 1994 WL 184644 (9th Cir. Cal.). The court in *Wade*, in its discussion of the torture-murder special circumstance jury instructions, relies on the California Supreme Court decision of *People v. Davenport*, 710 P.2d 861, 875-76 (Cal. 1985) in concluding that the torture-murder special circumstance instructions were deficient. The court, in *Wade*, vacated Wade's death sentence.

In *Wade*, the court was not persuaded by the government's argument that there was a spillover effect from the instructions regarding guilt and the closing argument of the prosecutor to establish an "intent to inflict extreme pain". *Id.* at p. *9. The court in *Wade* thus vacated Wade's death sentence on the grounds that the jury's verdict on guilt and the prosecutor's argument was not enough to establish the intent requirement for the crime of murder by torture.[1]

In the pending matter, the California Supreme Court, in *People v. Morales*, 48 Cal. 3d 527, 257 Cal. Rptr. 64 (1989), likewise, found that the trial court's instructions regarding the torture-murder special circumstance were flawed in that they failed to explain the proof of an intent to inflict extreme pain. In *People v. Morales*, the Court likewise relied on the decision of *Davenport*. However, the Court in *People v. Morales* concluded that the jury's *implied* finding of torture

1. In that the only other special circumstance found by the jury, that of "heinous, atrocious or cruel" murder, was invalidated by the Supreme Court, the court in *Wade* found that the petitioner was ineligible for the death penalty. *Id.* at p. *9

murder was adequately supported by the evidence. This Court agrees.

In the present case, the trial court's instructions regarding the torture-murder special circumstance were flawed because, unlike the torture-murder instructions themselves, they failed to explain that proof of an intent to inflict extreme pain was required to sustain such a finding. *People v. Morales* at p. 561. Moreover, instead, the jury was told only that, to establish the special circumstance, the murder must be intentional, that it involved torture and that "(t)o prove the infliction of torture, the infliction of extreme pain must be proved no matter how long its duration." *Id.*

In the pending matter, as in *Wade*, the jury was correctly instructed that torture murder requires proof of an "intent to cause cruel pain and suffering." Unlike *Wade*, however, here the jury was also told that the torture-murder instruction "does not apply to the special circumstance allegation of murder by torture. The elements required for that special circumstance will appear later in the instructions." These "later instructions" were silent regarding the requirement of intentional infliction of extreme or cruel pain. *People v. Morales*, at p. 562. The Court also noted:

> In the pending case, although the jury did not expressly find a torture murder was committed in this case, instead, it was found premeditated and deliberate and that the victim was aware of extreme pain. But we may conclude the jury necessarily or impliedly found a torture murder - otherwise there would have been no purpose in

> its special finding regarding the victim's awareness of the extreme physical pain inflicted by defendant. Thus, we reasonably may sustain the torture-murder special circumstance finding on the basis that, as instructed, the jury necessarily found an intent to cause extreme pain when it found defendant guilty of torture murder.

Id. at p. 562.

This Court agrees, unlike in *Wade*, the jury, in the pending matter, made a special finding that the victim was aware of extreme pain when it found Morales guilty of torture murder. This Court concludes that the jury's implied finding of torture must not be vacated. Thus, this Court does not find that summary judgment is warranted as to Count Twenty-Six based on an Eighth Amendment violation.

2. This Court Does Not Find That Petitioner Has Been Denied His Sixth Amendment Rights.

Concerning the petitioner's Sixth Amendment claim, this Court finds that the prosecution was held to proof beyond a reasonable doubt and any alleged error with respect to the instructions did not affect that burden. The burden did, in fact, remain proof beyond a reasonable doubt. As to the jury trial on the element of intent to inflict extreme pain, the issue of intent to inflict extreme pain was before the jury in regards to the torture-murder first-degree murder theory. Furthermore, as noted above, the jury necessarily found the element to exist by virtue of its explicit finding in connection with the murder verdict that Morales had actually inflicted extreme pain upon Ten Winchell.

Appendix C

This Court finds that petitioner was not constitutionally entitled to have the added element of intent to inflict extreme pain as a prerequisite to him becoming death eligible.

Accordingly, this Court does not find that petitioner has been denied his Sixth Amendment rights.

3. This Court Does Not Find That Petitioner Has Been Denied His Fourteenth Amendment Rights.

Furthermore, this Court is not convinced that the Fourteenth Amendment has been violated. In applying a Fourteenth Amendment "general 'fairness' approach," the United States Supreme Court "has always moved with caution before striking down state procedures." *Spencer v. Texas*, 385 U.S. 554, 563-65, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1966). Before a federal court may overturn a state criminal conviction on due process grounds, it must find that the challenged state action is more than "undesirable, erroneous, or even universally condemned, but that it violated some right guaranteed by the Fourteenth Amendment." *Cupp v. Naughton*, 414 U.S. 141, 146, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). State criminal procedure "does not run afoul of the Fourteenth Amendment because another method may seem . . .to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Massachusetts*, 291 U.S. at 105, 54 S. Ct. 330, 78 L. Ed. 674.

Here, petitioner does not point to any independent constitutional violation that has been violated under the Fourteenth Amendment. More importantly, historical practice dictates that the death eligibility findings, whether identified

in some states as "aggravating circumstances" or identified in California as "special circumstances," did not exist in the United States until after *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), where for the first time the United States Supreme Court identified the Eighth Amendment need for rationally limiting a jury's discretion in capital cases.

This is true in this case since the California Supreme Court first added the intent to inflict extreme pain requirement in *People v. Davenport, supra*, only because of the erroneous view that this additional element was needed to avoid Eighth Amendment narrowing deficiency through to exist as a result of the United States Supreme Court's Opinions in *Greg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) and *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759 (1980).

The state law questions as to the elements of the torture-murder special circumstance are irrelevant. "[T]he question to be decided by a federal court on petition for habeas corpus is not whether the state sentencer committed state law error in relying upon an adequately narrowed aggravating factor [i.e. special circumstance]." *Richmond v. Lewis*, __U.S. __, 113 S. Ct. 528, 536, 121 L. Ed. 2d 411 (1992). "Rather, the federal, Constitutional question is whether such reliance is so 'arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation'". *Richmond v. Lewis*. Indeed, this Court submits that petitioner can establish neither of the above violations, and any rule that such a violation occurred here would create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S.

288, 299-300, 103 S. Ct. 1060, 103 L. Ed. 2d 334 (1988). Although petitioner does not engage in a detailed discussion of an alleged Fourteenth Amendment violation, this Court is not convinced and does not find evidence of a Fourteenth Amendment violation. Thus, this Court does not find that petitioner has been denied his Fourteenth Amendment rights.

Accordingly, this Court DENIES petitioner's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED: JUL 18 1994

s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States District Court

APPENDIX D — OPINION OF THE SUPREME COURT OF CALIFORNIA DATED APRIL 6, 1989, MODIFIED ON DENIAL OF REHEARING JUNE 1, 1989

SUPREME COURT OF CALIFORNIA

No. S004552
Cr. No. 23153

THE PEOPLE,

Plaintiff and Appellant,

v.

MICHAEL ANGELO MORALES,

Defendant and Appellant.

April 6, 1989.
As Modified on Denial of Rehearing June 1, 1989.

LUCAS, Chief Justice.

On May 29, 1981, an amended information was filed in San Joaquin County Superior Court charging defendant Morales with murder, and alleging as special circumstances that (1) the murder was intentional and involved the infliction of torture (Pen. Code, § 190.2, subd. (a)(18); further statutory references are to this code unless otherwise indicated), and (2) defendant intentionally killed the victim while lying in wait (*id.*, subd. (a)(15)). In addition, the amended information alleged that defendant personally used deadly weapons, namely, a knife and hammer (§ 12022, subd. (b)), that he conspired to commit murder (§ 182), and that he forcibly

raped the victim (§ 261, subd. (2)). (The amended information also alleged as special circumstances a robbery-murder (§ 190.2, subd. (a)(17)(i)), a rape-murder (*id.*, subd. (a)(17)(iii)), and a heinous and cruel murder (*id.*, subd. (a)(14)). These three special circumstance allegations, and a robbery charge, were dismissed prior to trial.)

On November 24, 1982, the case was transferred to Ventura County after defendant's motion to change venue was granted. On April 7, 1983, the jury returned its verdict, finding defendant guilty of murder in the first degree, and finding true the two remaining special circumstance allegations. The jury also expressly found that the murder was willful, deliberate and premeditated, that the victim was aware of extreme physical pain inflicted by defendant, and that defendant personally used two deadly weapons (knife and hammer) in the commission of the offense. The jury additionally found defendant guilty of forcible rape and conspiracy to commit murder; the jury specified various overt acts supporting the conspiracy charge.

On April 19, 1983, prior to the commencement of the penalty phase, the trial court granted in part defendant's motion for new trial, ruling that there was insufficient evidence to support the jury's implied finding of first degree murder by torture. (Following the penalty phase, this ruling was vacated on the People's motion and the court instead purported to grant judgment notwithstanding the verdict (n.o.v.) as to the jury's implied finding of first degree torture murder. The People have filed a cross-appeal from this ruling, which we consolidated with the present appeal for purposes of argument.)

Appendix D

On April 19, 1983, the penalty phase commenced and, on April 25, the jury returned a death verdict. On June 14, 1983, the trial court denied defendant's motion to modify the judgment (§ 190.4, subd. (e)), and sentenced defendant to death. This appeal is automatic (§ 1239). As will appear, we have concluded that although the court's purported judgment n.o.v. must be set aside, in all other respects the judgment should be affirmed in its entirety.

I. THE FACTS

The record discloses that defendant and his cousin, Ricky Ortega, plotted to kill Terri Winchell, a woman who had maintained a sexual relationship with Randy Blythe, Ortega's male lover. (Ortega's case was severed from defendant's case prior to trial.) The evidence indicates that Ortega and Blythe had a homosexual relationship between 1979 and 1981; that Blythe met Winchell in 1980 and became her lover; and that Ortega, accordingly, became upset and was overheard threatening to kill himself or Blythe. Thereafter, in late 1980, a few weeks prior to the murder, Ortega told Glenda Chavez that he was angry at Winchell for accusing him of being a homosexual; Ortega threatened to "pay her back" for her remarks.

On January 8, 1981, Ortega called defendant and told him he was driving Winchell to defendant's apartment. Immediately after this conversation, defendant told his girlfriend, Racquel Cardenas, that he was going to do Ortega a favor and "hurt" a girl by strangling her with his belt. Thereafter (according to defendant's statements to a jailhouse informant, Bruce Samuelson, to Cardenas, and to an

acquaintance, Patricia Flores), the men lured Winchell into a car, where defendant attempted to strangle her with his belt until it broke, beat her repeatedly on the head with a hammer until she was unconscious or dead, dragged her body into a field and completed an act of sexual intercourse, and finally stabbed her four times in the chest to assure her death. (A more detailed statement of the facts and evidence is set forth as particular issues are discussed.)

Defendant did not testify in his defense, nor did he present any affirmative defenses. Instead, defense counsel relied primarily on contesting the People's case through cross-examination and argument. (Defendant did present some testimony in an attempt to rebut (1) the positive identification of shoe prints found at the crime scene, and (2) the cellmate's testimony that he discussed the murder events with defendant.)

At the penalty phase, the prosecutor introduced evidence regarding defendant's prior burglary and robbery convictions. Defendant introduced substantial mitigating testimony from friends, acquaintances and a clinical psychologist, each of whom attested to various aspects of his background and character, including his remorse, childhood traumas and "avoidant personality disorder," his problems with school and family, his artistic skills and the like. The psychologist, Dr. Carson, testified that in her opinion defendant was acting under extreme emotional or psychological duress when he killed victim Winchell.

Appendix D

II. GUILT PHASE CONTENTIONS

A. *Denial of Representative Jury*

1. *Defendant's Showing—Defendant*, a person of Hispanic origin, contends that, by reason of defects in the process of selecting jury panels for Ventura County trials, he was denied his constitutional right (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16) to a jury drawn from a representative cross-section of the community. (*See Duren v. Missouri* (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579; *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748.) He does not complain of any disparity on his own jury, which included three persons with Hispanic surnames. Instead, he challenges the process by which jurors are selected or exempted from jury duty.

According to defendant, although persons of Hispanic origin account for 18.26 percent of all adult persons living in Ventura County, a much smaller percentage of Hispanics actually reported for jury duty on two consecutive sample panels (including his own panel) examined by defendant prior to trial.

Thus, of 364 persons reporting for jury duty on February 28, 1983, only 39 (10.71 percent) had Hispanic surnames, and of 424 persons reporting for jury duty on March 7, 1983, only 37 (or 8.73 percent) had such surnames. A defense statistician testified that it was highly unlikely that such small percentages could have occurred if the jury panel was randomly drawn. According to his testimony, based on the number of panelists and the county-wide percentage of

Hispanics, the chances of randomly drawing a jury panel containing only 10.71 percent Hispanics was approximately 1 in 1,000, while the chances of randomly drawing a panel containing only 8.73 percent Hispanics was approximately 1 in 10,000.

Based on the foregoing statistics, defendant moved the trial court to quash the jury panel. The court, following a pretrial evidentiary hearing, denied the motion on the following grounds: (1) use of Hispanic surnames, without further verification, was too imprecise a method on which to base a claim of systematic exclusion; defendant's own witness admitted that a variation of 10 to 15 percent could be expected if surnames alone were used; (2) defendant's own jury was comprised of 25 percent Hispanics, indicating no serious underrepresentation problem existed; (3) the disparities shown by defendant evidently "occurred from perfectly legitimate causes," such as failure to deliver, or to respond to, jury duty notices, noncitizenship, travel distances, financial burden excuses, and the like. As the court noted, "there's really no reason for the Court to pick one [cause] over the other in this case"; and (4) the disparities shown by defendant "are not as great as the disparities in the cases that have been cited to the Court."

2. *Ventura County Procedures*—Defendant renews his contention based on systematic exclusion or underrepresentation of Hispanics arising from Ventura County's allegedly lax jury selection processes. The record indicates that the county draws prospective jurors from a pool of approximately 500,000 persons whose names appear on voters' registration lists and Department of Motor Vehicles

records. A computer randomly selects prospective jurors from the pool without regard to race or national origin. Exemptions or excuses are available for such reasons as advanced age, nonresidency, difficulty with the English language, lack of sufficient intelligence, prior felony convictions, travel distance, lack of adequate transportation, extreme financial hardship, physical or mental incapacity, and public health or safety factors. If a person selected for jury duty believes he is entitled to be excused, he must return a written questionnaire and statement under penalty of perjury to the jury commissioner, who later rules on the request. Thereafter, a list is prepared and a special letter sent to each person who failed to respond to the jury summons, requiring him to explain his absence.

The commissioner grants or denies excuses based on the reasons given in the questionnaire and statement submitted to the prospective jurors. All persons claiming financial hardship must identify their employers, although no attempt is made to verify that employment. The commissioner maintains a written record noting the policies these various employers have adopted regarding pay for jury duty. The commissioner's office seldom independently investigates or verifies claimed excuses or exemptions. The office has conducted no studies to determine the number or percentage of Hispanics on voters' or drivers' registration lists, or the number of such persons who were excused or exempted by the county's system of jury selection.

During the week of March 7, 1983, 1,950 potential jurors were summoned, but only 424 appeared. Of those not appearing, 103 persons were excused for lack of

transportation, and 233 were excused for extreme financial hardship. Similar figures were obtained for the week of February 28. Defendant, offering no specific evidence on the subject, speculates that a large number of these excused persons were Hispanics, and that the disparity disclosed by his statistics may well be the result of the county's failure to enforce more vigorously its jury selection program.

3. *Applicable Legal Principles*—The burden was on defendant to make a prima facie showing that he was denied his right to a jury drawn from a representative cross-section of the community, thereby shifting the burden to the People to explain or justify the selection process. The defendant's showing must include proof that (1) the excluded group is a "distinctive group in the community," (2) representation of this group is unreasonably small in relation to the number of such persons in the community, and (3) such underrepresentation results from a "systematic exclusion" of the group during the jury selection process. (*Duren v. Missouri*, *supra*, 439 U.S. 357, 364, 99 S.Ct. 664, 668; *see People v. Harris* (1984) 36 Cal.3d 36, 50, 201 Cal.Rptr. 782, 679 P.2d 433.)

The parties agree that the first prong of the test was satisfied. (*See Castaneda v. Partida* (1977) 430 U.S. 482, 495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498.) As to the second prong, the People contend that the "absolute disparity" indicated by defendant's statistics did not reveal a significant disparity; proof of a 10.71 percent and 8.73 percent Hispanic representation on two sample jury panels assertedly was not legally significant when compared to an 18.26 percent community representation. As the People point out, the

resulting absolute disparities (obtained by subtracting the jury representation percentage from the community percentage) amounted to only 7.55 and 9.53 percent. According to the People, these figures are insufficient under federal cases indicating that an absolute disparity in excess of 10 percent must be shown to justify a finding of unreasonable underrepresentation. (*See, e.g., Alexander v. Louisiana* (1972) 405 U.S. 625, 630, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 [14 percent disparity sufficient]; *Swain v. Alabama* (1965) 380 U.S. 202, 208-209, 85 S.Ct. 824, 829-830, 13 L.Ed.2d 759 [10 percent disparity inadequate]; *United States ex rel. Barksdale v. Blackburn* (5th Cir.1981) 639 F.2d 1115, 1127 [absolute disparities ranging from 4.45 to 11.49 percent deemed insufficient]; *United States v. Maskeny* (5th Cir.1980) 609 F.2d 183, 190 [less than 10 percent disparity held insufficient].)

Defendant urges, however, that we adopt a "comparative disparity" standard which takes into account the relative size of the underrepresented group in the community. (*See People v. Harris, supra*, 36 Cal.3d 36, 47, fn. 2, 201 Cal.Rptr. 782, 679 P.2d 433 [dictum suggesting such a standard could be "helpful" in deciding underrepresentation cases].) According to defendant, the unfairness of a particular exclusion is magnified where the group's community representation is already relatively small, i.e., a 10 percent disparity is comparatively more unfair to a group comprising only 12 percent of the population (leaving only a minimal 2 percent representation) than to a group comprising 60 percent (leaving a 50 percent representation). Defendant's calculations indicate that, using a system of comparative disparity, Hispanics were underrepresented by 41 and 52 percent on the two sample panels referred to above.

The People, on the other hand, cite several federal cases criticizing the use of a comparative disparity formula. (*E.g., United States v. Hafen* (1st Cir.1984) 726 F.2d 21, 2324, *cert. den.* (1984) 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561.) In addition, the People question the reliability of the data used in preparing defendant's statistical analysis: The various figures cited by defendant were obtained by a college instructor, specializing in Hispanic heritage and lifestyles, who examined the various jury lists and counted the Hispanic sounding surnames. No attempt was made to confirm that the names selected were indeed those of persons of Mexican-American background.

Moreover, according to the People, the statistics offered by defendant were derived from an inadequate sample: two consecutive jury panels covering a period of only two weeks. The People observe that far more complete surveys were offered in prior cases, especially where the issue was whether any systematic exclusion had occurred. (*See, e.g., Duren v. Missouri, supra,* 439 U.S. at p. 362, 99 S.Ct. at p. 667 [weekly venires over eight-month period]; *People v. Harris, supra,* 36 Cal.3d 36, 53, 201 Cal.Rptr. 782, 679 P.2d 433 [three-month survey of jury panels in Long Beach area].)

As for the third prong, systematic exclusion, defendant relies on cases suggesting that a statistical discrepancy which discloses a disproportionate underrepresentation can itself indicate a systematic exclusion, i.e., a disparity "'inherent in the particular jury selection process utilized.'" (*See People v. Harris, supra,* 36 Cal.3d 36, 58, 201 Cal.Rptr. 782, 679 P.2d 433, quoting *Duren v. Missouri, supra,* 439 U.S. at p. 366, 99 S.Ct. at p. 669; *People v. Buford* (1982) 132

Cal.App.3d 288, 296, 182 Cal.Rptr. 904 ["*Duren* . . . strongly suggests that in a proper case the second and third prongs of the prima facie case can be satisfied by statistics alone"].) We next review the *Buford* decision and the subsequent cases which question its analysis.

4. *The Buford and Alexander Decisions*—Defendant places primary emphasis on the statistical evidence, cited above, indicating that the chances of similar disparities occurring at random were 1 in 10,000 and 1 in 1,000. In *Buford, supra*, 132 Cal.App.3d 288, 182 Cal.Rptr. 904, involving a similar claim that adult Blacks were underrepresented on Contra Costa County juries, the court employed a "statistical significance" test to conclude that a probability of random chance less than six-tenths of 1 percent (i.e., 1 in 166) was small enough to warrant an inference of systematic exclusion sufficient to shift the burden to the People to explain or justify the county's practices. (*Id.*, at pp. 297-299, 182 Cal.Rptr. 904; *see also People v. Harris, supra*, 36 Cal.3d 36, 47, fn. 2, 201 Cal.Rptr. 782, 679 P.2d 433, and authorities cited.)

Buford observed that the defendant in that case had "presented evidence suggesting a plausible systematic explanation for some degree of disparity, i.e., the informal procedure by which Contra Costa County goes about excusing prospective jurors from service. The jury commissioner testified that approximately 40 percent of all prospective jurors are either excused or deferred; that less than 5 percent of those excused or deferred ever submit written verification of their asserted reasons for excuse or deferral; and that approximately 80 percent of the requests

. . . are granted over the phone by one of the commissioner's staff, without benefit of written guidelines. . . . [¶] It is doubtful that either the Legislature or the Judicial Council intended that every financial cost be treated as an 'extreme financial burden.' (Cal. Rules of Court, appen., § 4.5(b)(2).) Jury service is, after all, a duty as well as a right. Though characterized as a deferral, through successive exercise, the commissioner's financial hardship policy effectively excuses low-skilled, nonunion employees whose employers usually do not pay for jury service. '[E]xcessive excuses . . . can upset the demographic balance of the venire in essential respects.' (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 273 [148 Cal.Rptr. 890, 583 P.2d 748].)" (*People v. Buford*, *supra*, 132 Cal.App.3d 288, 298-299, 182 Cal.Rptr. 904.)

The dissent in *Buford* concluded that the defendant's statistics and other evidence failed to show any "extraordinary" disparity or bad faith on the county's part, and that in any event no one has suggested what the county reasonably could do to assure a greater percentage of Blacks on its jury panels, given the necessity of providing excuses for financial or other hardship, medical problems, and the like. (The defendant had suggested the impractical solution of busing Blacks to the courthouse.)

Defendant submits that *Buford* is controlling, and that the evidence presented here was likewise sufficient to create a prima facie case of systematic exclusion. As previously indicated, however, there are some differences in the counties' excusal practices, such as the requirement of written excuse requests, which suggest that Ventura County is making a greater effort at enforcing its jury summonses. Moreover,

the People, noting defendant's exclusive reliance upon the two jury panels sampled by him, argue that the size of the sample was too small, and the duration of the sample too short, to raise a legitimate inference of systematic exclusion. (In *Buford*, at least *four* different panels were scrutinized, and additionally a jury commissioner was questioned about his visual observations of the number of Blacks on Contra Costa weekly jury panels.)

Like the dissent in *Buford*, we believe that a prima facie case of systematic exclusion or underrepresentation of a distinctive class is not made merely by demonstrating that the county's race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw. In the present case, as in *Buford*, *any* juror could apply for exemption or excusal; the evidence here did not indicate that Hispanics were granted a disproportionate number of exemptions or excuses. By contrast, in *Duren v. Missouri*, *supra*, 439 U. S. 357, 99 S.Ct. 664, Missouri law automatically exempted *all women* from jury duty, upon their request. In other words, the underrepresentation of women on state juries was the immediate and direct result of the state's exemption laws. (*See also Taylor v. Louisiana* (1975) 419 U.S. 522, 524, 95 S.Ct. 692, 694, 42 L.Ed.2d 690 [similar automatic exclusion of women].) No such direct and immediate result was demonstrated here.

Cases subsequent to *Buford*, *supra*, 132 Cal.App.3d 288, 182 Cal.Rptr. 904, question the validity of many of its assumptions. First, in a series of cases involving similar

claims of underrepresentative juries in Contra Costa County, the courts have concluded that a *post-Buford* tightening of jury excusal procedures (such as requiring written excuse requests, verification of medical excuses, and investigating persons who fail to respond to summonses) indicates that the county is now doing all that can reasonably be expected, despite continuing disparities of the nature disclosed in *Buford* and the present case. (*See People v. Simmons* (1985) 164 Cal.App.3d 1070, 1072-1073, 211 Cal.Rptr. 60; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 352, 207 Cal.Rptr. 622; *People v. Black* (1984) 160 Cal.App. 3d 480, 482-483, 206 Cal.Rptr. 744; *People v. Jones* (1984) 151 Cal.App.3d 1029, 199 Cal.Rptr. 185.)

In *People v. Alexander* (1985) 163 Cal.App.3d 1189, 210 Cal.Rptr. 306, the defendant raised a similar representative jury claim with respect to Kern County juries, contending that his jury was selected from a panel containing a disproportionately smaller number of Blacks and Spanish surnamed persons than would be expected as a result of random selection. Defendant's claim was based on the *Buford* premise that such underrepresentation resulted from unduly lax practices and methods employed by the jury commissioner's office in excusing persons on grounds of hardship. As *Alexander* observed, "[t]he record suggests that Kern County follows no written standards in excusing jurors, and does not always require written requests before jurors are excused. Jurors are often excused by telephone. . . ." (P. 1198, 210 Cal.Rptr. 306.)

The *Alexander* court recited that the defendant's statistics, based on comparing general county population

figures with the actual jury venires during August 1982, showed absolute disparities for Blacks and Spanish surnamed persons of 1.8 and 6.2 percent respectively. Defendant's expert testified that the chances of such disparities occurring randomly were one in ten million for Blacks, and one in one million for Spanish surnamed persons. *Alexander* nonetheless characterized as "speculative" *Buford*'s assumption (*supra*, 132 Cal.App.3d 288, 182 Cal.Rptr. 904) that a disproportionate number of minority group members asked for and received an excuse from jury service, observing that no statistical information had been furnished to support that thesis. (163 Cal.App.3d at pp. 1200-1201, 210 Cal.Rptr. 306.) *Alexander* likewise noted that no statistical evidence had been offered to show that reforms of the county's standards and practices for excusing jurors, such as those suggested by *Buford*, would substantially reduce the disparity. (P. 1201, 210 Cal.Rptr. 306.)

As the court stated, "The fact is, without more factual information, accurate conclusions regarding the cause of the disparity cannot be drawn and any attribution of the cause is wholly speculative. At a minimum, it should be known what the absolute disparity is between minorities in the general population and the number who appear on the jury venire. To the extent that the absolute disparity may be due to economic, cultural, social or language considerations, the difference must be deemed to be 'unavoidable.' (*See People v. Harris*, *supra*, 36 Cal.3d at p. 59 [201 Cal.Rptr. 782, 679 P.2d 433].)" (163 Cal.App.3d at p. 1201, 210 Cal.Rptr. 306.)

Alexander also observed that the defendant's use of figures derived from the general population, rather than from

those eligible to vote, "skews the basic statistics toward showing a larger absolute disparity by an amount unknown. Common experience dictates that the percentage of minorities appearing in the general census figures who are statutorily ineligible for jury service must be large. [Fn. omitted.] Yet those ineligible are included in the gross population figures utilized in the statistics presented by appellant." (P. 1202, 210 Cal.Rptr. 306.)

Alexander concluded that because of the difficult proof problems in these cases, we should hesitate to assume too readily that the statistical disparity is attributable to causes over which the courts have control. "In reality, it may well be that the amount of the absolute disparity attributed to the procedure of informally excusing jurors is infinitesimal and inconsequential when compared to the other major causes of such disparity. Only further proof and factual information will clarify the significance of the practices utilized in excusing jurors. At this point, attributing the statistical disparity entirely to the practice of orally excusing jurors for undue hardship without written standards would not appear to be justified. *Nor should an assumption of such speculative causation serve as a basis for reversal of a criminal conviction.*" (P. 1203, 210 Cal.Rptr. 306, italics added.)

Despite the foregoing comments, *Alexander* stressed that trial courts should continue to assure compliance with all statutory and rule requirements regarding excusal from jury service. (P. 1203, 210 Cal.Rptr. 306.) The court also observed that because the People had presented almost no rebuttal evidence, relying on the pre-*Harris* rule forbidding challenges based upon gross population statistics, rather than "voter

eligible" statistics, a remand would be appropriate to allow the People to present rebuttal evidence and to enable the trial court to "rule upon this issue in light of such evidence and comments and guidelines herein." (P. 1204, 210 Cal.Rptr. 306, fn. omitted.) The court's order recited that the case was remanded for hearing on the question whether Kern County "was and is doing all that it reasonably may be expected to do to assure" representative juries. (P. 1206, 210 Cal.Rptr. 306.)

5. *Conclusion*—We conclude that defendant here did not make a prima facie showing sufficient to shift the burden of explanation or justification to the People. First, his statistical showing was based upon an inadequate sample. Certainly, no case cited by defendant has held that a prima facie case of systematic exclusion can be made based on statistics derived from only *two* consecutive sample jury panels. The sample was too small in size, and too short in duration, to support a finding of unreasonable underrepresentation or systematic exclusion.

Significantly, *Buford* distinguished an earlier case (*People v. Mooring* (1982) 129 Cal.App.3d 453, 181 Cal.Rptr. 71) on the basis, among others, that "the statistical evidence in that case was more limited as to time. . . ." (132 Cal.App.3d 288, 299, fn. 5, 182 Cal.Rptr. 904.) In *Mooring*, the defendant unsuccessfully asserted a claim that residents of Richmond were underrepresented on county jury panels. Like defendant's presentation herein, the statistical evidence in *Mooring* was drawn from only *two* jury panels; the disparity figures (11.36 percent county-wide distribution; 6.79 and 7.11 percent jury panel representation) were quite similar to those presented here. The *Mooring* court characterized those figures

as "insubstantial." (129 Cal.App.3d at p. 459, 181 Cal.Rptr. 71.)

Second, unlike the situation in *Duren, supra*, 439 U.S. 357, 99 S.Ct. 664, where all women were automatically excluded, defendant merely showed possible laxity in enforcing race/class *neutral* excusal practices. Such a showing fails to constitute a prima facie case of systematic exclusion of those minority groups affected by such practices.

Third, Ventura County's jury selection practices, including the requirement of a written request for excuse or deferral, signed under penalty of perjury, adequately distinguish *Buford* and would support a finding (like the Contra Costa County decisions which followed *Buford)* that Ventura County is already doing all it reasonably can to assure a representative jury.

We conclude that defendant's showing was insufficient to raise a prima facie case of systematic underrepresentation.

B. *Premeditated Murder Finding*

The jury was instructed on three separate theories of first degree murder, namely, premeditated murder, murder by torture, and murder by lying in wait. (*See* § 189.) The jury found defendant guilty of first degree murder, and also expressly found the murder was premeditated. Thus, although defendant challenges the jury's implied findings of lying-in-wait murder and torture murder, if the premeditated murder finding is sustained we need not consider defendant's contentions regarding these alternative theories of first degree

murder. (We do, however, discuss some of these contentions in connection with our review of the lying-in-wait and torture-murder special-circumstance findings.) Accordingly, we turn next to the issues which bear on the premeditated murder finding.

Defendant acknowledges the jury's special finding of premeditated murder, but argues that (1) there was no statutory basis for that finding, and (2) the jury was not instructed that such a finding must be based on proof beyond a reasonable doubt. Neither point has merit.

Section 1150, with exceptions not pertinent here, requires a "general verdict." (*See also* § 1152 [special verdicts].) Defendant characterizes the jury's finding as a forbidden special verdict. We disagree. As we pointed out in *People v. Burgener* (1986) 41 Cal.3d 505, 537, 224 Cal.Rptr. 112, 714 P.2d 1251, a special verdict "presents conclusions of fact and leaves to the court the task of drawing conclusions of law and rendering judgment upon them where the jury is unable to do so." In the present case, of course, the jury itself rendered additional findings which fully resolved all counts submitted for its consideration.

In *Burgener*, the trial court asked the jury to make a special finding as to whether or not the murder was committed with express malice and with deliberation and premeditation. We held that such special findings were appropriate under section 190.4, subdivision (a), which requires a special finding "on the truth of each alleged special circumstance." A finding as to malice and premeditation was deemed appropriate to support the felony-murder special-

circumstance finding, by reason of *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (later overruled in *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1139, 240 Cal.Rptr. 585, 742 P.2d 1306), and its "intent to kill" requirement. (*Burgener, supra*, 41 Cal.3d at pp. 536-538, 224 Cal.Rptr. 112, 714 P.2d 1251.) We further observed that, in any event, it was not reasonably probable that a more favorable verdict would have been rendered had the jury not been directed to make a special finding as to malice and premeditation. (P. 538, 224 Cal.Rptr. 112, 714 P.2d 1251.)

Burgener seems controlling here. As in that case, a special finding on the issues of premeditation and deliberation may have been deemed appropriate to support the torture-murder special-circumstance finding, which requires proof of an *intentional* murder. (§ 190.2, subd. (a)(18).) In any event, the evidence of premeditation and deliberation was overwhelming in this case, and any error in instructing the jury to decide that issue by a special finding was accordingly harmless.

Defendant also contends that the court failed to instruct the jury that its special finding should be based on proof beyond a reasonable doubt. We rejected a similar argument in *Burgener, supra*, 41 Cal.3d 505, 538-540, 224 Cal.Rptr. 112, 714 P.2d 1251, observing that the jury was adequately instructed regarding the People's general proof burden and the reasonable doubt standard, and that there was "no reasonable possibility that the jury could have been misled as to the appropriate standard for their special finding on express malice. The instructions taken as a whole indicate that the prosecutor's burden of proof throughout was proof

beyond a reasonable doubt." (P. 540, 224 Cal.Rptr. 112, 714 P.2d 1251.)

Similarly, in the present case, the instructions *repeatedly* emphasized the need to apply a reasonable doubt standard in deciding such issues as defendant's guilt, the degree of his crimes, the truth of the special circumstances, and the weapon enhancement issue. In short, no other standard reasonably could have been applied by the jury.

C. *Admissibility of Ortega's Statements Implicating Defendant*

Accomplice Ortega was tried separately from defendant. Ortega's former girlfriend, Christina Salaices, was permitted to testify at defendant's trial regarding her conversation with Ortega, five months prior to the Winchell slaying, wherein Ortega indicated that he was planning to kill Randy Blythe (Ortega's male lover, who had begun a sexual relationship with victim Winchell). According to Salaices, Ortega expressed his intent to go to Randy's house, ring his doorbell, stab him when he opened the door, and "turn the knife in him to see the expression on his face." Ortega also said that "Mikey (defendant Morales) would be with him because Mikey wouldn't let him stop. Mikey would help him and Mikey wouldn't let him stop, that Mikey would be there." In addition, Ortega told Salaices that "if Terri [victim Winchell] was there, that she was gonna get it, too."

1. *Admissibility Under Hearsay Exceptions*—Defendant objected on hearsay grounds to the admission of the foregoing statements as they pertained to him, and he renews that

objection here. We conclude that the statements were admissible.

Defendant and Ortega had been charged with conspiring to murder Winchell, and Ortega's statements regarding his expectation of defendant's assistance in a related murder plot were relevant to prove the existence and nature of that conspiracy. The People thus contend that Ortega's statements were admissible under either (1) the coconspirator's exception to the hearsay rule (Evid.Code, § 1223), or (2) the state-of-mind exception to that rule (*id.*, § 1250).

Defendant properly disputes the applicability of the coconspirator's exception. Subdivision (a) of section 1223 of the Evidence Code requires that "[t]he statement was made by the declarant [Ortega] while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy." Yet no evidence was offered to show that Ortega was conspiring *with anyone* to kill either Blythe or Winchell at the time of his conversation with Salaices, five months prior to Winchell's murder. (*See People v. Irwin* (1888) 77 Cal. 494, 504-505, 20 P. 56.) We agree with defendant that, in the absence of proof of an ongoing conspiracy at the time Ortega's statement was made, section 1223 was inapplicable. (It is also doubtful that the statement to Salaices was "in furtherance" of any conspiracy, rather than mere boasting to a girlfriend.)

As for the state-of-mind exception, section 1250, subdivision (a), of the Evidence Code creates a hearsay exception for relevant statements "of a declarant's then existing state of mind . . . (including a statement of intent,

plan, motive . . .)," when the evidence is offered (1) to prove the declarant's state of mind at that time or any other time, or (2) to explain his acts or conduct. Defendant contends that Ortega's intentions or state of mind were irrelevant to the case against defendant. The People, on the other hand, assert that, in light of the conspiracy charges against defendant, Ortega's statements were admissible to show his earlier intent or plan to draw defendant into a conspiracy involving the killing of Blythe, and possibly Winchell.

We agree with the People. Ortega's admitted plan to kill Blythe, his stated assumption or expectation that defendant would help or encourage him in doing so, and his remark that if Winchell were present she would "get it too," in the aggregate were probative of the question whether the two men later conspired to kill Winchell.

2. *Confrontation Clause*—Defendant argues that the admission of Ortega's statements, coupled with Ortega's unavailability for cross-examination, violated federal confrontation rights guaranteed by the Sixth Amendment. (*See Bruton v. United* States (1968) 391 U.S. 123, 135-136, 88 S.Ct. 1620, 1627-1628, 20 L.Ed.2d 476.) But because Ortega's statements were properly admitted under the well recognized state-of-mind exception to the hearsay rule, the federal confrontation clause would likewise permit admission of such evidence. (*See Bourjaily v. United States* (1987) 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144; *United States v. Inadi* (1986) 475 U.S. 387, __, 106 S.Ct. 1121, __, 89 L.Ed.2d 390; Ohio v. *Roberts* (1980) 448 U.S. 56, 65-66, 100 S.Ct. 2531, 2538-2539, 65 L.Ed.2d 597.)

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D. *Corpus Delicti of Rape*

Defendant next argues that the corpus delicti of rape was not established independently of his own statements. More precisely, defendant contends that, apart from his statements, the evidence was insufficient to show that victim Winchell was alive when the act of intercourse took place. (*See People v. Stanworth* (1974) 11 Cal.3d 588, 604-605, fn. 15, 114 Cal.Rptr. 250, 522 P.2d 1058.) Defendant points to evidence that Winchell did not move or change position following the sex act, and that she died quickly after being stabbed. Defendant notes that a pathologist testified that Winchell was alive when the stabbing occurred, and cellmate Bruce Samuelson testified that defendant told him he raped Winchell before stabbing her; evidently, this was the sole testimony indicating that Winchell was alive when the sex act took place.

The People observe that defendant did not raise the corpus delicti objection at trial. (*See People v. Rogers* (1978) 21 Cal.3d 542, 547-548, 146 Cal.Rptr. 732, 579 P.2d 1048.) In addition, the People cite as evidence of a rape (1) the act itself, including the presence of spermatozoa and the condition of Winchell's clothing and body; (2) medical testimony that Winchell was probably alive when stabbed; and (3) medical testimony that Winchell could have survived for 10 minutes *after* being stabbed and beaten on the head. Only slight evidence is required to establish the corpus delicti, which maybe inferred from circumstantial evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 115, 181 Cal.Rptr. 391, 641 P.2d 1253.) The foregoing evidence was sufficient to support a finding of rape.

E. *Failure to Instruct on Viewing Jailhouse Informant's Testimony With Distrust*

Defendant next contends that the court erred in failing to instruct the jury, sua sponte, that it should view the testimony of jailhouse informants such as Bruce Samuelson with distrust. We rejected this precise contention in *People v. Hovey* (1988) 44 Cal.3d 543, 565-566, 244 Cal.Rptr. 121, 749 P.2d 776. (*See also People v. Alcala* (1984) 36 Cal.3d 604, 623-624, 205 Cal.Rptr. 775, 685 P.2d 1126.)

Here, the jury was told about Samuelson's criminal record, and also was informed that the district attorney had agreed to recommend a favorable sentence for Samuelson's pending auto theft and forgery charges, in return for his testimony incriminating defendant. Moreover, the jury was given standard instructions on assessing a witness's credibility, and viewing oral admissions with caution. The court had no sua sponte duty to give additional instructions on assessing cellmate testimony.

III. SPECIAL CIRCUMSTANCES ISSUES

A. *Lying-in-wait Murder*

The jury found true the lying-in-wait special-circumstance allegation (*see* § 190.2, subd. (a)(15) ["[t]he defendant intentionally killed the victim while lying in wait"]). Defendant challenges the foregoing finding on several grounds.

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The instructions told the jury that the special circumstance required proof of an intentional murder committed while lying in wait, and that "[lying in wait requires the following elements: waiting, watching, and concealment. . . . The element of concealment . . . may manifest itself either by an ambush *or by the creation of a situation where the victim is taken unawares even though he sees his murderer.* While concealment is an element . . . , it is only a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise." (Italics added.) Finally, the jury was told that if it had a reasonable doubt whether "a perceptible interruption separates the period of concealment and watchful waiting from the period during which the killing takes place, you must find that special circumstance is not true."

1. *Insufficient Instructions*—Defendant argues that the foregoing instructions were inaccurate in failing to require an actual physical concealment. We disagree. Before we discuss the applicable legal principles, however, we briefly summarize the evidence in this case as it pertains to the lying-in-wait issue.

Accomplice Ortega asked victim Winchell to accompany him to a shopping mall to find a gift for a friend. After learning from Ortega that the couple would be arriving soon to pick him up, defendant armed himself with a belt, knife and hammer, telling his girlfriend Racquel Cardenas that he was going to do Ortega a favor and "hurt" a girl by strangling her with his belt. When Ortega and Winchell arrived, defendant climbed in the back seat, directly behind Winchell

in the front seat. After Ortega had driven through town to a more isolated location, defendant reached over the seat and attempted to strangle Winchell with the belt. The belt broke, and then he began to beat her head repeatedly with the hammer. Winchell's cries for help from driver Ortega indicated that she was taken by surprise, and was previously unaware of any plan to harm her.

Defendant argues that there was insufficient evidence of his *concealment* from victim Winchell; indeed, the record is clear that Winchell was aware that defendant was seated behind her during the ride. Defendant argues that the foregoing lying-in-wait instructions improperly permitted the jury to predicate a lying-in-wait finding upon a mere concealment of defendant's *purpose*, rather than actual concealment of his *person*. Contrary to defendant's position, however, the cases have indicated that physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder. (*People v. Sutic* (1953) 41 Cal.2d 483, 492, 261 P.2d 241 [concealment in ambush unnecessary]; *People v. Tuthill* (1947) 31 Cal.2d 92, 100-101, 187 P.2d 16 [victim aware of defendant's physical presence prior to attack]; *People v. Byrd* (1954) 42 Cal.2d 200, 208-209, 266 P.2d 505 [defendant waited for four hours in front of his former wife's home, entered it, conversed with her, and shot her]; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 407, 226 Cal.Rptr. 880 [concealment of defendant's purpose is sufficient]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 475-476, 212 Cal.Rptr. 440 [concealment of identity, defendant being disguised as policeman]; *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007, 181 Cal.Rptr. 486 [secret design to

take victim by surprise]; *People v. Ward* (1972) 27 Cal.App.3d 218, 230, 103 Cal.Rptr. 671 [same].)

As stated in *Ward*, the concealment element "may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares *even though he sees his murderer*." (27 Cal.App.3d at p. 230, 103 Cal.Rptr. 671, italics added.) Thus, in *Sassounian*, *supra*, 182 Cal.App.3d 361, 226 Cal.Rptr. 880, also involving the validity of a lying-in-wait special-circumstance finding, defendant was first observed waiting on a street corner a few minutes before the shooting, then was seen standing by the passenger side of the victim's car while the shooting was occurring, and then seen running away with an accomplice while stuffing a gun into his pants. On appeal, the court rejected his argument that instructions on a lying-in-wait special circumstance were inappropriate because there was no evidence of any *concealment* prior to the shooting.

As the *Sassounian* court explained, "concealment, in the sense that the defendant uses the term, is not required in order to justify and support a 'lying-in-wait' special circumstance. The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations.]" (182 Cal.App.3d at pp. 406-407, 226 Cal.Rptr. 880.)

We conclude that the jury in the present case was properly instructed on the concealment element of the lying-in-wait special circumstance, and that the evidence was sufficient to support a finding of lying-in-wait murder, based on defendant's watchful waiting, from a position of advantage in the back seat, while the car was driven to a more isolated area, and his sudden surprise attack, from behind and without warning, on victim Winchell. (*See also People v. Ruiz* (1988) 44 Cal.3d 589, 615, 244 Cal.Rptr. 200, 749 P.2d 854 [defendant, a family member, waited until his victims were asleep before killing them].)

Defendant relies primarily on two cases which assertedly conflict with the foregoing authorities. In *People v. Merkouris* (1956) 46 Cal.2d 540, 559- 560, 297 P.2d 999, we concluded that lying-in-wait instructions should not have been given under the circumstances in that case. There, the defendant on several prior occasions had been seen sitting in a car parked near the crime scene, but significantly he was not so observed on the day of the murder a few days later. We cited *Sutic*, *supra*, 41 Cal.2d 483, 261 P.2d 241, and *Tuthill*, *supra*, 31 Cal.2d 92, 187 P.2d 16, with apparent approval but distinguished those cases on the ground that in *Merkouris*, "The killings were not accomplished through defendant's watchful waiting in his car; there was no attempt at either concealment or secrecy; and the killings did not follow on the heels of the watchful waiting." (46 Cal.2d at p. 560, 297 P.2d 999.)

Thus, although there was a period of watchful waiting in *Merkouris*, it occurred several days prior to the murders. *Merkouris* is thus distinguishable, for in the present case

defendant's watchful waiting occurred contemporaneously with the assault, and indeed was part of the "means" through which that assault could be accomplished. (*See Tuthill, supra*, 31 Cal.3d at p. 101, 187 P.2d 16.)

Next, defendant cites *Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 314-316, 194 Cal.Rptr. 120, to support his position that some period of *physical* concealment is required to sustain a lying-in-wait finding. There, the victim was stabbed to death and robbed after being lured to a garage by the defendants on the pretext that they needed to recover some of their tools. Because there was no indication as to precisely how the murder occurred, and thus no evidence that the defendants "approached the victim from physical concealment after 'watchful waiting,' " the *Richards* court dismissed the lying-in-wait special-circumstance allegation. (Pp. 314-316, 194 Cal.Rptr. 120.) Significantly, *Richards* rejected the argument that the element of concealment could be satisfied merely by taking the victim "unawares" from behind; the court observed that such a rule "would require that we equate concealment with surprise. . . ." (P. 315, 194 Cal.Rptr. 120.)

Richards is factually distinguishable, given the absence of *any* period of watchful waiting on the defendants' part. They simply lured their victim to a garage and killed him. Nonetheless, the court's insistence on some period of actual physical concealment stands in conflict with the cases, previously cited, which indicate that, *if a period of watchful waiting is shown* which immediately precedes the assault, a concealment of purpose, coupled with a surprise attack from a position of advantage, will satisfy the concealment element

in lying-in-wait murder. We thus disapprove *Richards* to the extent it would require an actual physical concealment as an element of lying in wait.

2. *Constitutional Considerations*—Defendant suggests that our interpretation of the lying-in-wait statute as not requiring an actual physical concealment runs afoul of constitutional principles barring the arbitrary selection of certain murders as justifying the death penalty. In defendant's view, such an interpretation would provide no meaningful basis for distinguishing capital and noncapital cases, and would thereby allow the arbitrary or irrational imposition of the death penalty. (*See, e.g., People v. Rodriguez* (1986) 42 Cal.3d 730, 778, 230 Cal.Rptr. 667, 726 P.2d 113; *People v. Davenport* (1985) 41 Cal.3d 247, 265-266, 221 Cal.Rptr. 794, 710 P.2d 861.)

Defendant assumes that, unless a physical concealment requirement is imposed, a lying-in-wait finding could be routinely made "in the case of any intentional murder in which the defendant decides to attack his victim, but waits and watches—without notifying his victim of his intent to attack—before inflicting the fatal injuries." In defendant's view, physical concealment adds an element of plotting "far in excess of the level of forethought required for premeditation and deliberation," and additionally suggests "a particularly repugnant form of sneaking cowardice." (*See Richards v. Superior Court*, supra, 146 Cal.App.3d 306, 314, fn. 5, 194 Cal.Rptr. 120 [observing that in earlier times, special scorn was reserved for those whose attack after lying in wait deprived the surprised victim of the opportunity for reflection and contrition].)

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We reject defendant's constitutional challenge to our interpretation of the lying-in-wait special-circumstance statute. First of all, we do not mean to suggest that a mere concealment of purpose is sufficient to establish lying in wait—many "routine" murders are accomplished by such means, and the constitutional considerations raised by defendant might well prevent treating the commission of such murders as a special circumstance justifying the death penalty. But we believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, 2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

The question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances. But contrary to defendant's argument, we conclude that an intentional murder undertaken by lying in wait in the foregoing manner is properly among the kinds of aggravated killing which justify society's most severe penalty.

3. *No Cognizable Interruption*—Defendant next contends that the evidence was insufficient to show that the murder was committed *while* defendant was lying in wait (§ 190.2, subd. (a)(15)), that is, that the murder occurred without any "cognizable interruption" following the period of lying in wait. (*See Domino v. Superior Court*, *supra*, 129 Cal.App.3d at p. 1011, 181 Cal.Rptr. 486.) Indeed, defendant

suggests that only a "pure ambush" situation would satisfy the *Domino* rule. The point lacks merit.

Section 189 provides that a murder "perpetrated by means of" lying in wait is first degree murder. Section 190.2, subdivision (a)(15), however, describes the lying-in-wait special circumstance as the commission of an intentional murder "*while* lying in wait." (Italics added.) *Domino* held that the use of the word "while" in the latter provision indicated that a closer temporal proximity was required than needed to prove mere lying-in-wait murder. As *Domino* stated, "the killing must take place during the period of concealment and watchful waiting *or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends.* If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (129 Cal.App.3d at p. 1011, 181 Cal.Rptr. 486, italics added.)

We need not consider the validity of *Domino*'s restrictive interpretation of the special circumstance provision (cf. *People v. Guzman* (1988) 45 Cal.3d 915, 949-952, 248 Cal.Rptr. 467, 755 P.2d 917), because the evidence in this case clearly would support a finding that defendant's lethal acts flowed continuously from the moment he commenced his surprise attack. Defendant, after watching and waiting until the car and its occupants reached the outskirts of town, suddenly and without prior warning attacked his victim from behind with the intent to kill her. Although victim Winchell evidently survived defendant's initial attempt to strangle and beat her to death, no "cognizable interruption" occurred

between the period of watchful waiting and the commencement of the murderous *and continuous* assault which ultimately caused her death.

Defendant speculates that Winchell may have already been aware of his and Ortega's murderous plans, and accordingly she was not taken by surprise. But her screams for assistance from Ortega would support a finding that she was indeed surprised by, and unprepared for, the attack. We conclude that the lying-in-wait special-circumstance finding should be sustained.

4. *No Corpus Delicti*—Defendant next argues that because the evidence of lying in wait was derived primarily from his own extrajudicial statements, the prosecution failed to establish the corpus delicti of the lying-in-wait special circumstance. We have recently rejected the argument that nonfelony-based special circumstances must be supported by independent proof of the corpus delicti (*People v. Howard* (1988) 44 Cal.3d 375, 415, 243 Cal.Rptr. 842, 749 P.2d 279; *see Newberry v. Superior* Court (1985) 167 Cal.App.3d 238, 241, 213 Cal.Rptr. 129; *People v. McDermand* (1984) 162 Cal.App.3d 770, 798, 211 Cal.Rptr. 773 [no corpus delicti required for lying-in-wait special circumstance]), and we see no reason to reconsider our holding here.

B. *Torture Murder*

As previously indicated, the jury was instructed on three theories of first degree murder, namely, premeditation, lying in wait and torture. The jury returned a verdict of first degree murder, expressly finding that the killing was premeditated,

and that the victim was "aware of extreme physical pain inflicted" by defendant, a finding from which we can infer a finding of torture murder. Additionally, the jury found true the torture-murder special-circumstance allegation.

Although we need not directly confront defendant's challenges to the jury's torture-murder finding (because the conviction of first degree murder can be sustained on a premeditated murder basis), a brief examination of the issues is necessary as background to our discussion of the validity of the torture-murder special-circumstance finding.

1. *Intent to Inflict Extreme Pain*—In this case, the evidence indicated that victim Winchell's death was extremely prolonged and painful. Severe pain, however, accompanies most homicides and, accordingly, we have held that murder by torture requires a premeditated *intent* to inflict extreme and prolonged pain. (*People v. Steger* (1976) 16 Cal.3d 539, 546, 128 Cal.Rptr. 161, 546 P.2d 665.) The jury was so instructed in this case.

An intent to inflict pain may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. (*See Steger, supra*, at p. 546, 128 Cal.Rptr. 161, 546 P.2d 665; *see also People v. Robertson* (1982) 33 Cal.3d 21, 51, 188 Cal.Rptr. 77, 655 P.2d 279; *People v. Demond* (1976) 59 Cal.App.3d 574, 583-584, 130 Cal.Rptr. 590.) *Steger* observed that cases reversing torture-murder convictions "have focused on the lack of evidence of calculation," a factor indicating a killing "in hot anger." (16 Cal.3d at p. 547, 128 Cal.Rptr. 161, 546 P.2d 665.) Although the evidence in the present case was somewhat

ambiguous concerning defendant's intent in this regard, it seems clear that such evidence, including the premeditated and prolonged assault, the unusually forcible strangulation attempt, the numerous hammer and stab wounds, the rape, and defendant's earlier statement that he intended to "hurt" and strangle a girl, was sufficient to sustain the jury's implied finding of intent to inflict extreme pain.

2. *Judgment N.O.V.*—Having concluded the evidence was sufficient to support a torture-murder finding, we must next consider the effect of the trial court's limited judgment n.o.v., which purported to vacate that finding for lack of sufficient evidence of intent to torture. The trial court originally granted a new trial on this issue, later vacating that ruling in favor of a judgment n.o.v. The People have filed a cross-appeal from the judgment n.o.v., arguing that the court lacked authority to enter it.

The precise sequence of events leading to the People's appeal is as follows: Prior to the commencement of the penalty phase, defendant moved for a new trial on various grounds, including insufficiency of the evidence to establish the intent element of torture murder. The trial court granted the new trial motion only as to the jury's implied finding of torture murder, and the penalty phase commenced. (The court, denying a new trial as to the torture-murder special-circumstance finding, mistakenly assumed that an intent to cause extreme pain was not an element of the special circumstance.) The People later moved the court to set aside its new trial order, on the basis that double jeopardy principles would bar a retrial of any murder prosecution based on torture murder. Accordingly, the court vacated its new trial order

and granted a judgment n.o.v. as to the jury's implied torture-murder finding. Following entry of the death penalty judgment, the People filed a cross-appeal from the judgment n.o.v.[1]

We agree with the People that the trial court's purported judgment n.o.v. must be set aside. (*See People v. Morgan* (1977) 75 Cal.App.3d 32, 39, 141 Cal.Rptr. 863 [no judgment n.o.v. available in criminal cases].) Although *Morgan* suggested that such a judgment might be treated as a new trial order, the court's order herein does not fall within any of the statutory grounds for new trial. The only ground that might apply is that the "verdict or finding" was contrary to the law or evidence (§ 1181, subd. 6). As the People observe, however, there was no "verdict or finding" which was set aside, because the court *upheld* the first degree murder conviction. Although the jury's verdict may well have

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1. Defendant has moved to dismiss the People's appeal on the basis that the trial court's order was unappealable under section 1238, subdivision (a). That provision contains the various orders appealable by the People, including an order granting a new trial (subd. (a)(3)), an order "modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense" (subd. (a)(6)), and an order "dismissing or otherwise terminating the action . . . where the defendant has waived jeopardy" (subd. (a)(8)). Because the court allowed defendant's first degree murder conviction to stand, its n.o.v. judgment neither granted a new trial, reduced the degree of the offense, imposed a lesser offense, nor dismissed the action.

Although the trial court's judgment n.o.v. technically is not appealable, we are clearly entitled to review that ruling as part of the automatic appeal properly before us. (§ 1239.)

contained an *implied* finding of torture murder, we have found no case indicating that a new trial order is appropriate to annul an implied finding, especially one affecting only *one* of several potential theories of first degree murder.

Moreover, the fact remains that the trial court vacated its new trial order on the express ground of a concern over the "double jeopardy bar," and accordingly it would be improper to treat the judgment n.o.v. as a new trial order for purposes of sustaining the court's judgment.

We conclude that (1) the jury's implied finding of torture murder was adequately supported by the evidence, and (2) the court lacked the authority to set aside that finding in the manner attempted here.

3. *The Torture-murder Special Circumstance*— Defendant correctly observes that the trial court's instructions regarding the torture-murder special circumstance were flawed because, unlike the torture-murder instructions themselves, they failed to explain that proof of an intent to inflict extreme pain was required to sustain such a finding. (*See People v. Davenport, supra*, 41 Cal.3d 247, 270-271, 221 Cal.Rptr. 794, 710 P.2d 861; *People v. Leach* (1985) 41 Cal.3d 92, 109-110, 221 Cal.Rptr. 826, 710 P.2d 893.) Instead, the jury was told only that, to establish the special circumstance, the murder must be intentional, that it involved torture, and that "[t]o prove the infliction of torture, the infliction of extreme pain must be proved no matter how long its duration." The People concede the error but argue it was harmless.

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We recently held in *People v. Odle* (1988) 45 Cal.3d 386, 414-415, 247 Cal.Rptr. 137, 754 P.2d 184 that failure to instruct on an element of a special circumstance is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Thus, we must determine whether, beyond a reasonable doubt, the jury would have found an intent to inflict cruel pain in this case, absent the instructional error.

In another recent case, we held that this precise error may be cured by other instructions which, in the context of defining the crime of torture murder (§ 189), adequately explain that torture requires an intent to inflict extreme pain. (*People v. Wade* (1988) 44 Cal. 3d 975, 994-995, 244 Cal.Rptr. 905, 750 P.2d 794.) In the present case, as in *Wade*, the jury was correctly instructed that torture murder requires proof of an "intent to cause cruel pain and suffering." Unlike *Wade*, however, here the jury was also told that the torture-murder instruction "does not apply to the special circumstance allegation of murder by torture. The elements required for that special circumstance allegation will appear later in these instructions." These "later instructions" were, of course, silent regarding the requirement of an intentional infliction of extreme or cruel pain.

Defendant argues that the evidence indicates his sole intent was to quickly strangle Winchell to death; the hammer and knife came into play only after his belt broke during the attempted strangulation. (*See People v. Leach, supra*, 41 Cal.3d at p. 110, 221 Cal.Rptr. 826 [evidence of numerous wounds could merely indicate great difficulty in killing victim].) Certainly, defendant's remark to an acquaintance

that he intended to "hurt" a girl by strangling her was ambiguous. As previously explained, severe pain accompanies most homicides, but torture requires an additional intention that the victim suffer extreme pain. (*People v. Steger, supra,* 16 Cal.3d 539, 546, 128 Cal.Rptr. 161, 546 P.2d 665.)

The jury did not expressly find a torture murder was committed in this case; instead, it found that the murder was premeditated and deliberate, and that the victim was aware of extreme pain. But we may conclude the jury necessarily or impliedly found a torture murder—otherwise there would have been no purpose in its special finding regarding the victim's awareness of the extreme physical pain inflicted by defendant. Thus, we reasonably may sustain the torture-murder special-circumstance finding on the basis that, as instructed, the jury necessarily found an intent to cause extreme pain when it found defendant guilty of torture murder.

The trial court (through its disputed judgment n.o.v.) expressed its doubt as to the sufficiency of the evidence of an intent to torture, and defendant suggests that such misgivings reinforce his contention that the instructional error at issue here was not harmless beyond a reasonable doubt. But as we have seen, the court lacked the authority to issue its judgment n.o.v. Thus, the jury's implied finding of torture murder must stand, and it necessarily would include a finding of intent to cause extreme pain, thereby rendering harmless any instructional error as to the special circumstance.

We conclude that the torture-murder special-circumstance finding should be sustained.

IV. PENALTY PHASE CONTENTIONS

A. *Denial of Sequestration of Jury*

Defendant complains of the trial court's denial of his request to sequester the jury during its penalty phase deliberations, both during lunch hour and a forthcoming weekend. The court denied "lunchtime" sequestration on the stated ground that "we haven't got the facilities or funds to buy them lunch. It's about as simple as that." The court, however, ordered the bailiff to look into the possibility of roping off a section of the cafeteria for the jury's exclusive use. (The record is silent as to whether this was done.) The request for "weekend" sequestration was denied without comment, and the jury was released for the weekend prior to rendering its verdict.

1. *Sequestration Not Mandatory*—Defendant argues that in a capital case, sequestration should be deemed mandatory. He observes that many other states require such sequestration in order to assure fairness and impartiality by eliminating outside influences upon the jury. (*See, e.g., Lowery v. State* (Ind. 1982) 434 N.E.2d 868.)

Prior to 1969, California courts were required to order sequestration in a capital case. (Former § 1121; People v. *Chain* (1971) 22 Cal.App.3d 493, 497, 99 Cal.Rptr. 472.) The present statute, however, is clearly discretionary. (*See* §§ 1121, 1128; *cf. People v. Burwell* (1955) 44 Cal.2d

16, 22, 33, 279 P.2d 744; *People v. Erno* (1925) 195 Cal. 272, 282, 232 P. 710.) As we recently held in *People v. Ruiz, supra,* 44 Cal.3d 589, 616-617, 244 Cal.Rptr. 200, 749 P.2d 854, unlike other jurisdictions, California has no statutory or constitutional basis for judicially adopting a rule requiring sequestration in every capital case.

2. *Abuse of Discretion*—Defendant next contends that, even if sequestration was not mandatory, the trial court abused its discretion in denying that remedy. It is true that the trial court's expressed reason for denying sequestration (inability to buy lunch for the jurors) was rather insubstantial. (*See* § 1136, requiring the county, at its expense, to provide a sequestered jury with food, lodging and other necessaries.) On the other hand, defendant made no showing whatever that any special problems existed which made sequestration especially appropriate. Defendant merely pointed out to the court that the penalty phase was the "critical phase of the trial," an observation that would apply to all capital cases. Defendant cited no forthcoming news items or other external factors which might unduly influence the jury. (Indeed, venue already had been changed to a more neutral county to avoid the effects of pretrial publicity.) We conclude that the court did not abuse its discretion in denying sequestration.

B. *Failure to Admonish Jury During Each Adjournment*

At the commencement of the guilt phase deliberations, the court admonished the jury that it might discuss the case only when all 12 jurors were present in the jury room, that deliberations must cease when any jurors were absent, and that during recess the jurors should refrain from discussing

the case with "anybody at home, anybody on the jury, court staff, members of the public or anybody at all," until all jurors had returned to the jury room. This admonishment was concededly proper. (*See People v. Linden* (1959) 52 Cal.2d 1, 29, 338 P.2d 397.)

Thereafter, immediately prior to the penalty phase closing arguments, the court announced a lunch break and admonished the jury that, "During this recess . . . remember again that you are not to discuss the case among yourselves and not to form or express any opinions or conclusions about the issues." Following the closing arguments, and prior to giving the jury instructions, the court adjourned for the day, stating that, "I am again going to admonish you and this may be the last time I admonish you in open court. I am sure you remember the admonishment by now. It's that you not discuss the case among yourselves or with anyone else, nor permit anyone to discuss the case with you. [¶] And further remember that you are not to form or express any opinions or conclusions about the issues in the case until I submit it to you for decision."

The next morning, the court welcomed the jury, stating, "Before I read the instructions to you I want to remind you of some things that I said before. And I am not going to repeat myself entirely about what goes on in deliberations because I have said these things to you after I sent you out after the guilt phase." The court then instructed the jury, and deliberations commenced. Immediately thereafter, the court asked counsel to stipulate that the jurors might be excused at the usual times without being brought into court and readmonished. Defense counsel declined to so stipulate,

requesting that the jury be readmonished during lunch and end-of-day breaks. The court denied the request, observing that the jury already had heard the admonishment "about fifty or sixty times."

Defendant now contends that the court erred in denying his request for continued readmonishment. He observes that section 1128 by its terms requires that "[i]f the jurors are permitted by the court to separate, the court shall properly admonish them." (*See also* §§ 1121, 1122.) Defendant concedes that he has found no case which requires reversal for failure to readmonish, but he observes that no other case involved a denial of an express request to do so.

The general rule is sometimes phrased in a manner supporting defendant's position. Thus, it has been stated that "error in failing to give the required admonition does not require reversal *unless the defendant calls the trial court's attention to the omission at the time of the adjournment*, or unless the defendant on appeal affirmatively points to prejudice resulting from the omission." (*People v. Campbell* (1976) 63 Cal.App.3d 599, 610, 133 Cal.Rptr. 815, italics added.)

We believe a more accurate statement of the rule would be that *both* an objection and proof of prejudice are required before a failure to readmonish would be deemed reversible error. As we stated in *People v. Linden*, *supra*, 52 Cal.2d 1, 28-29, 338 P.2d 397, "[f]ailure to give the statutory admonition is not ground for reversal where, as here, no prejudice appears. [Citations]." (*See also People v. Gastelum* (1965) 237 Cal.App.2d 205, 207, 46 Cal.Rptr. 743.) *Linden*

further explained that an abbreviated admonition ("Remember and abide by the admonition heretofore given") is adequate, and that "[t]his is particularly true where no objection is made at the time the abbreviated instruction is given." Thus, *Linden* may suggest that an objection does not satisfy the necessity of proving prejudice.

Prejudice will not be presumed from a failure to admonish. (*People v. Heishman* (1988) 45 Cal.3d 147, 175, 246 Cal.Rptr. 673, 753 P.2d 629; *People v. Campbell, supra*, 63 Cal.App.3d 599, 610, 133 Cal.Rptr. 815.) Defendant points to the fact that, during deliberations, an article appeared in a county newspaper which urged the death penalty for defendant. Counsel requested the court to inquire of the jurors whether they had read the article, but the court failed to do so. Defendant now suggests that the court improperly precluded him from showing prejudice from the failure to readmonish.

The People note that the jurors were carefully told to avoid any media coverage of the case, and to divert their attention if they inadvertently became so exposed. The People further observe that defendant failed to move for new trial on this basis (*see* § 1181, subd. 3), and accordingly failed to submit any juror affidavits which would have supported a showing of prejudice. On this record, given the court's repeated admonishments prior to the penalty phase deliberations, we have no reasonable basis for finding any likelihood of prejudice to defendant from the court's failure to readmonish the jurors.

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C. *Other Crimes Instructions*

At the penalty phase, the People introduced evidence disclosing that defendant was convicted of burglary in 1979, and robbery (two counts) in 1981. With respect to the robbery, the People introduced testimony regarding the surrounding circumstances, including defendant's assaults upon the store owner and his pregnant wife. In addition, during the guilt phase, cellmate Samuelson testified that defendant, while the men were in jail, had solicited him to murder Racquel Cardenas and Patricia Flores testified that defendant, a few days after Winchell's murder, had made threatening gestures toward Flores with a hammer, telling her he would "take care of" her if her fiance asked him to do so. (The prosecutor did not rely on either the Samuelson or Flores testimony as an aggravating circumstance at the penalty phase, although he did mention the hammer incident in his closing argument.) Defendant now contends the court erred in failing to instruct the jury that it should not consider these various prior offenses unless it found beyond a reasonable doubt they were committed. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 54, 188 Cal.Rptr. 77, 655 P.2d 279.)

With respect to the burglary and robbery, the People observe that the *Robertson* instruction need not be given where defendant already has been convicted of the prior offense. (*See People v. Gates* (1987) 43 Cal.3d 1168, 1202, 240 Cal.Rptr. 666, 743 P.2d 301.) Defendant correctly points out, however, that here the evidence extended beyond the mere fact of conviction of robbery, and included testimony regarding defendant's assault on the robbery victims. As noted in *Gates*, 43 Cal.3d at page 1202, footnote 13, 240

Cal.Rptr. 666, 743 P.2d 301, a *Robertson* instruction should be given where the penalty phase evidence discloses a crime in addition to the one of which the defendant was convicted. Assuming that a *Robertson* instruction should have been given, it is very doubtful that defendant was prejudiced by the omission. The assaults involved were relatively minor, involving no serious or permanent injuries to either victim. Moreover, the victims' testimony was uncontradicted and unimpeached. (*See Gates*, at p. 1202, 240 Cal.Rptr. 666, 743 P.2d 301 [finding harmless error under similar circumstances]; *People v. Miranda* (1987) 44 Cal.3d 57, 9798, 241 Cal.Rptr. 594, 744 P.2d 1127 [same].)

As for the Samuelson and Flores guilt phase testimony, although such evidence indeed may have indicated that defendant had committed prior crimes, the evidence was admitted for other reasons and was not relied on by the prosecutor as an aggravating factor supporting the death penalty. Accordingly, *Robertson* is inapplicable to such testimony. (*See People v. Robertson, supra* 33 Cal.3d at p. 60, 188 Cal.Rptr. 77, 655 P.2d 279 [conc. opn. by Broussard, J.]; *People v. Williams* (1988) 44 Cal.3d 1127, 1146-1147, 245 Cal.Rptr. 635, 751 P.2d 901.) Additionally, the Flores testimony involved defendant's acts and statements shortly after the Winchell murder, and may have been admissible as a circumstance surrounding that offense (§ 190.3, subd. (a)). Thus, the prosecutor's reference to that testimony in his penalty phase argument did not invoke *Robertson*. We conclude that the failure to give the "reasonable doubt" instruction with respect to defendant's other crimes was, at worst, harmless error.

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D. *Inadmissibility of Subsequent Crime*

The robbery referred to in the preceding section occurred before defendant's murder of Terri Winchell. He was *convicted* of that robbery, however, following the murder but prior to trial. Accordingly, defendant correctly observes that evidence of his conviction of this "subsequent" offense was inadmissible under section 190.3, subdivision (c), pursuant to the holding in *People v. Balderas* (1985) 41 Cal.3d 144, 201-203, 222 Cal.Rptr. 184, 711 P.2d 480.

In *Balderas*, the court held that prior convictions are admissible under subdivision (c) only if they were entered prior to the charged capital offense. The People now urge that we reconsider *Balderas*, but it seems clear that any *Balderas* error was harmless in this case, given the fact that the evidence surrounding the commission of the robbery was properly admissible under section 190.3, subdivision (b). As *Balderas* observes, "subdivision *(b)* imposes *no* time limitation on the introduction of 'violent' crimes; the jury presumably may consider criminal violence which has occurred at any time in the defendant's life." (41 Cal.3d at p. 202, 222 Cal.Rptr. 184, 711 P.2d 480, italics in original.) The additional fact that defendant was *convicted* of that offense could have added very little to the total picture considered by the jury, a picture which properly included defendant's prior burglary conviction, his commission of a violent robbery, and the aggravated nature of the Winchell offense.

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E. *Extreme Mental Disturbance and Extreme Duress*

At the penalty phase, defendant relied in part on evidence of his emotional and developmental problems, resulting in a "personality disorder" which included a fear of social contact with persons other than his cousin, Ricky Ortega. The court instructed the jury regarding the various statutory sentencing factors, including section 190.3, factors (d) and (g), which permitted the jury to consider whether defendant was under the influence of "extreme mental or emotional disturbance" (factor (d)), and whether he acted under "extreme duress" of another person (factor (g)). Defendant unsuccessfully moved the court to strike the word "extreme" from these instructions on the ground that it improperly limited the mitigating evidence defendant was entitled to submit to the jury.

We rejected a similar contention in *People v. Ghent* (1987) 43 Cal.3d 739, 239 Cal.Rptr. 82, 739 P.2d 1250, involving the 1977 death penalty law and its reference to "extreme mental or emotional disturbance" (former § 190.3, factor (c)). In *Ghent*, we stated that the "catchall" provision of former section 190.3, factor (j) ("any other circumstance which extenuates the gravity of the crime") was sufficient to permit the jury to take into account "a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense." (P. 776, 239 Cal.Rptr. 82, 739 P.2d 1250.) We also observed that nothing in the record indicates that the jury failed to give proper weight to defendant's mitigating evidence. (*Ibid.*)

In the present case, in addition to giving the "catchall" section 190.3, factor (k) instruction of the 1978 death penalty

law, the court expressly advised the jury that in deciding penalty, it should consider and weigh "any sympathetic factor of defendant's background raised by the evidence as a mitigating circumstance." Moreover, the court told the jury that the list of statutory mitigating circumstances merely included "examples of some of the factors that you may take into account," and that "[y]ou may also consider any other circumstances as reasons for not imposing the death sentence."

Defendant notes that the prosecutor argued to the jury that the evidence failed to show any "extreme" emotional disturbance or duress. But the prosecutor never argued that *only* an extreme condition could be considered by the jury in deciding penalty, and the court's instructions made it clear the contrary was true. We conclude that the jury was properly instructed in this regard. (The trial court's elaborate instructions regarding the jury's sentencing duties also readily circumvented the pitfalls catalogued in *People v. Brown* (1985) 40 Cal.3d 512, 538-545, 230 Cal.Rptr. 834, 726 P.2d 516.)

F. *Failure to Reinstruct on Viewing Defendant's Extrajudicial Statements With Caution*

Defendant next contends that the court erred in failing to reinstruct, sua sponte, at the penalty phase, that a defendant's own oral admissions should be viewed with caution. (*See People v. Romo* (1975) 14 Cal.3d 189, 194, 121 Cal.Rptr. 111, 534 P.2d 1015.) (Such an instruction was given at the guilt phase.) The argument is without merit.

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At the penalty phase, defendant's sister, Lisa Morales, testified regarding defendant's family loyalty and his promise to help her if she ever needed anything. On cross-examination, the prosecutor elicited the fact that defendant once told her that if anyone ever hurt her, he would "help" her with them. In other words, according to Miss Morales, "I guess [he would] hurt them the way they had hurt me."

Thereafter, defense counsel called defendant's friend, Lydia Lopez, who gave similar favorable testimony regarding defendant's willingness to help his friends. As an example, Mrs. Lopez indicated that defendant, after learning that her husband was angry with her, had once remarked that if her husband ever hurt her, "I don't know what I will be able to do," but indicated he would be there if anything happened. On cross-examination, the prosecutor asked if defendant had "offered to take care of your husband." The witness replied that defendant had made no such statement, but "just said he didn't know what he could do."

Assuming that the oral admissions rule applies to the penalty phase, it seems apparent that defendant's remarks in these two instances cannot be characterized as "admissions" for purposes of the rule requiring a cautionary instruction. In neither instance was defendant acknowledging or admitting any fact particularly damaging to his position at the penalty phase; the gist of the testimony was that defendant's loyalty to his relatives and friends extended to physically defending them if they needed such defense. In light of the other evidence in the case, such testimony seems quite harmless.

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As we stated in *Romo, supra*, 14 Cal.3d at page 194, 121 Cal.Rptr. 111, 534 P.2d 1015, the trial court should give the cautionary instruction, sua sponte, "where it is warranted by the evidence." We conclude that the evidence elicited from witnesses Morales and Lopez was insufficient to invoke that rule.

In a related argument, defendant observes that the jury was instructed that it might consider guilt phase evidence in deciding the penalty issue, and that the prosecutor, in his penalty phase closing arguments, relied upon some oral statements of defendant introduced at the guilt phase. Although the guilt phase jury was properly instructed to receive such statements with caution, defendant now contends that, in light of the prosecutor's subsequent use of the statements at the penalty phase, the jury should have been reinstructed on the matter.

The prosecutor referred to defendant's guilt phase statements only for purposes of attempting to rebut his penalty phase evidence indicating he felt remorse for his offenses. Defendant cites no authority supporting the necessity for a sua sponte instruction under such limited circumstances. As the People point out, defendant may well have had tactical reasons for not calling the jury's attention to his statements in a special penalty phase instruction. (*See People v. Davenport, supra*, 41 Cal.3d 247, 281, 221 Cal.Rptr. 794, 710 P.2d 861.) Moreover, a reasonable jury would assume such "generic" instructions remained applicable at the penalty phase. (*See People v. Brown* (1988) 46 Cal.3d 432, 460, 250 Cal.Rptr. 604, 758 P.2d 1135.)

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G. *Failure to Reinstruct Regarding Defendant's Failure to Testify*

Defendant elected not to testify at either the guilt or penalty phase. At the guilt phase, the jury was instructed not to draw adverse inferences from defendant's failure to testify, but the jury was not reinstructed on that subject at the conclusion of the penalty phase. Defendant asserts the omission constituted reversible error.

Defendant did not request that the jury be reinstructed, and he cites no cases requiring sua sponte reinstruction. The People note that there is no sua sponte duty to give a "no adverse inferences" instruction of the kind involved here, either at the guilt phase (*People v. Preston* (1973) 9 Cal.3d 308, 316, 107 Cal.Rptr. 300, 508 P.2d 300; *People v. Gardner* (1969) 71 Cal.2d 843, 852-854, 79 Cal.Rptr. 743, 457 P.2d 575), or the penalty phase (*People v. Gates*, *supra*, 43 Cal.3d 1168, 1208, 240 Cal.Rptr. 666, 743 P.2d 301). But these cases do not discuss whether an obligation to *reinstruct* exists once a guilt phase instruction has been given. It is evident, however, that defense counsel reasonably could decide, as a tactical matter, not to remind the jury of defendant's failure to testify in his defense. As *Gardner* observes, it is "debatable" whether the foregoing instruction is to defendant's advantage. (*Id.*, at p. 854, 79 Cal.Rptr. 743, 457 P.2d 575.) Moreover, as previously noted, a reasonable jury would assume the instruction continued to apply at the penalty phase. (*See People v. Brown*, *supra*, 46 Cal.3d at pp. 460, 250 Cal.Rptr. 604, 758 P.2d 1135.) Accordingly, we conclude that the trial court had no sua sponte duty to reinstruct as to defendant's failure to testify.

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H. *Guilt Phase Admission of Statements by Ortega and Samuelson*

Earlier in this opinion, we discussed defendant's contention of errors in admitting, at the guilt phase, statements of defendant's cousin, Ricky Ortega, and jailhouse informant Samuelson which implicated defendant. He now contends that such errors likewise infected the penalty phase, providing the jury with "extremely damning character evidence."

As we have explained, no error occurred in admitting such statements. Accordingly, defendant's present argument must be rejected.

1. *Prosecutor's References to Defendant's Lack of Remorse*

Defendant complains of prosecutorial argument to the effect that defendant failed to express any remorse for his acts. No objection was made to these comments, and accordingly the issue was waived. (*People v. Green* (1980) 27 Cal.3d 1, 27, 164 Cal.Rptr. 1, 609 P.2d 468; *see People v. Miranda, supra*, 44 Cal.3d at p. 107, 241 Cal.Rptr. 594, 744 P.2d 1127.) Moreover, we have held that the prosecutor properly may point out to the jury the absence of a particular mitigating factor such as remorse. (*People v. Ghent, supra*, 43 Cal.3d 739, 771, 239 Cal.Rptr. 82, 739 P.2d 1250; *see also Miranda, supra*, 44 Cal.3d at pp. 111-112, 241 Cal.Rptr. 594, 744 P.2d 1127.) Here, the jury was specifically instructed at defendant's request that it could consider remorse as a mitigating factor. Indeed, some of defendant's penalty witnesses testified that he wished he had not

committed the offenses, and defense counsel referred to defendant's remorse in his closing argument. Moreover, the prosecutor at no time commented upon defendant's failure to testify or to confess to his crimes. His argument was limited to defendant's lack of remorse. We conclude that no misconduct occurred here.

J. *Prosecutor's Demonstrative Use of a Hammer*

At the conclusion of his closing penalty argument, the prosecutor vividly demonstrated the number of hammer blows received by victim Winchell, stating:

"This is my last opportunity to say anything to you about this case, but there is one thing I want you to think about in the jury room and it's the essence of this case. Just think about this because this is what happened. Twenty-three times. It was just like this." The prosecutor thereupon counted from 1 to 23 as he swung the hammer in the air, acting out the 23 hammer blows suffered by Winchell. A defense objection following the count of 12 was overruled.

We have stated that "[a]lthough appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience. [Citations]. In this process, one of the most significant considerations is the nature of the underlying crime. (*See* Pen.Code § 190.3, [factor] (a).) Hence

assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing." (*People v. Haskett* (1982) 30 Cal.3d 841, 863-864, 180 Cal.Rptr. 640, 640 P.2d 776.)

Haskett also pointed out, however, that the court should maintain a careful balance between probative and prejudicial evidence or argument, and should curtail "inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response. . . ." (P. 864, 180 Cal.Rptr. 640, 640 P.2d 776.)

Haskett approved prosecutorial argument at the penalty phase inviting the jurors to put themselves in the victim's shoes and to imagine suffering the acts inflicted on her. (P. 863, 180 Cal.Rptr. 640, 640 P.2d 776; *see also People v. Hovey*, *supra*, 44 Cal.3d 543, 576, 244 Cal.Rptr. 121, 749 P.2d 776 [prosecutor's use of large portrait of child victim during penalty phase arguments]; *People v. Fields* (1983) 35 Cal.3d 329, 362, and fn. 14, 197 Cal.Rptr. 803, 673 P.2d 680.) Here, the prosecutor's hammer blows were intended to accomplish the same end as in *Haskett*, namely, to emphasize the heinous nature of the murder and the extent of the victim's suffering. Although counting out 23 hammer blows was probably unnecessary to accomplish this purpose, nonetheless, any misconduct could not have been prejudicial. The jury was presented with medical and other testimony outlining the cause and extent of Winchell's wounds. No reasonable juror aware of such evidence would have been swayed to vote for death by the prosecutor's demonstrative methods.

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K. *Automatic Motion to Modify Sentence*

Finally, defendant argues that the trial court relied on inadmissible evidence, and failed to consider defendant's mitigating evidence, in passing on his motion to modify the death sentence. (*See* § 190.4, subd. (e).) We disagree.

In every case in which a death penalty is returned, section 190.4, subdivision (e), requires the trial court to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and . . . make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings."

Defendant urges the court committed three errors in its statutory modification ruling. First, he contends that the court improperly considered inadmissible evidence, including his robbery conviction occurring subsequent to the Winchell murder, and the statements of Ricky Ortega implicating him. Second, defendant argues that the court improperly considered both special circumstance findings, including the torture-murder finding. Third, the court assertedly failed to consider defendant's evidence of duress as a mitigating factor because it was not "extreme."

As we have previously explained, the evidence of Ortega's statements and defendant's commission of a violent robbery was admissible on the grounds set forth herein. Although the fact of defendant's *conviction of* the robbery

was inadmissible (*People v. Balderas*, *supra*, 41 Cal.3d 144, 222 Cal.Rptr. 184, 711 P.2d 480), and should not have been considered by the court in deciding defendant's motion to modify sentence, the record does not indicate that the court placed undue weight upon that factor. As for the torture-murder special-circumstance finding, we have upheld that finding herein and accordingly it was proper for the court to consider it. With respect to the duress issue, although the trial court found no evidence of "extreme duress," there is no indication that it failed to consider the duress evidence offered by defendant. The record discloses that the court considered all of defendant's mitigating evidence, but believed that such evidence was insufficient to justify a modified sentence.

We conclude that the court committed no prejudicial errors in ruling on defendant's motion to modify the sentence.

The purported judgment n.o.v. as to the implied torture-murder finding is set aside, and in all other respects the judgment is affirmed.

PANELLI, EAGLESON, KAUFMAN and ARGUELLES,* JJ., concur.

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

Appendix D

MOSK, Justice, concurring and dissenting.

I concur in the affirmance of the judgment as to guilt: my review of the record discloses no prejudicial error on that issue. I dissent, however, from the affirmance of the judgment as to penalty: in my opinion, the special circumstance findings must be set aside and the judgment of death must accordingly be reversed as unsupported as a matter of law.

At the guilt phase the trial court instructed the jury on the special circumstances of murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and murder by torture (*id.*, § 190.2, subd. (a)(18)). As to the former, the court stated in relevant part: "To find that the [lying-in-wait] special circumstance . . . is true, each of the following facts must be proved: [¶] 1. That the defendant intentionally killed the victim, and [¶] 2. That the murder was committed while defendant was lying in wait. . . . [¶] Lying in wait requires the following elements: waiting, watching, and concealment. . . . [¶] The element of concealment which is required in lying in wait may manifest itself either by an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer. [¶] While concealment is an element necessary before lying in wait can be applied, it is only a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise." As to the latter special circumstance, the court stated in relevant part: "To find that the [torture-murder] special circumstance . . . is true, each of the following

facts must be proved: [¶] 1. That the murder was intentional, and [¶] 2. That the murder involved the infliction of torture."

Following deliberations at the guilt phase, the jury found each of the special circumstance allegations to be true and thereby determined that defendant was eligible for capital punishment. At the penalty phase they returned a verdict of death.

I believe that the lying-in-wait special circumstance finding must be vacated. The trial court erred by instructing the jury as it did on the allegation. I agree with the majority that the elements of the special circumstance are waiting, watching, and concealment. I cannot agree, however, "concealment" means anything other than actual *physical* concealment. In *Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 194 Cal.Rptr. 120, the Court of Appeal held—consistently with reason and authority—that "'[t]he gist of 'lying in wait' is that the person places himself in a position where he is waiting and watching *and concealed from the person killed* with the intention of inflicting bodily injury upon such person or of killing such person.'" (*Id.* at p. 316, 194 Cal.Rptr. 120, quoting *People v. Thomas* (1953) 41 Cal.2d 470, 473, 261 P.2d 1, and adding italics.) Judged against this holding, the trial court's instruction in this case effectively omitted the physical concealment element of the special circumstance and as a consequence was erroneous.

Further, the trial court's error was prejudicial. In *People v. Odle* (1988) 45 Cal.3d 386, 410-415, 247 Cal.Rptr. 137, 754 P.2d 184, the court held that failure to instruct on an element of a special circumstance is subject to harmless-error

analysis under the harmless-beyond-a-reasonable-doubt test of *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.[1] As noted above, the trial court, in practical effect, failed to instruct on physical concealment. Having reviewed the record in its entirety, I am simply unable to declare a belief, beyond a reasonable doubt, that the jury would have found physical concealment had they been properly instructed. The reason is manifest: the evidence establishes without dispute that defendant was *not* physically concealed from the victim.

But even if the majority were correct in holding that the lying-in-wait special circumstance requires concealment of only the defendant's true purpose and intent, I would nevertheless be compelled to conclude that the special circumstance finding must be vacated: insofar as it purports

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1. In a concurring opinion in *People v. Kimble* (1988) 44 Cal.3d 480, 244 Cal.Rptr. 148, 749 P.2d 803, I expressed the view that failure to instruct on an element of a special circumstance is automatically reversible, subject to the following exceptions: (1) the erroneous instruction was given in connection with a special circumstance allegation that was not found true; (2) the defendant conceded the issue underlying the omitted element; and (3) the issue was necessarily resolved adversely to the defendant under other, properly given instructions. (*Id.* at pp. 517-526, 244 Cal.Rptr. 148, 749 P.2d 803 (conc. opn. of Mosk, J.).) I continue to adhere to that view as a matter of personal belief. I have not succeeded, however, in persuading my colleagues of the soundness of my position. After reflection, I have decided not to beat a rataplan. Accordingly, I join the majority in concluding that failure to instruct on an element of a special circumstance is subject to harmless-error analysis under the *Chapman* test, but do so only under compulsion of *People v. Odle*, *supra*, 45 Cal.3d 386, 247 Cal.Rptr. 137, 754 P.2d 184.

to serve as a predicate for the determination of death-eligibility, it is constitutionally invalid.

To withstand scrutiny under the Eighth Amendment as a valid predicate for the determination of death-eligibility, a special circumstance "'. . . must . . . provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 151, 197 Cal.Rptr. 79, 672 P.2d 862, *overruled on other grounds in People v. Anderson* (1987) 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306; *see People v. Green* (1980) 27 Cal.3d 1, 61, 164 Cal.Rptr. 1, 609 P.2d 468.) Whether the basis for distinguishing between cases is "meaningful" depends on whether it serves the principal social goals of the death penalty: retribution and deterrence. (*Carlos v. Superior Court, supra*, 35 Cal.3d at p. 149, 197 Cal.Rptr. 79, 672 P.2d 862.)

In my view, the lying-in-wait special circumstance does not pass constitutional muster. My reasons are as follows. First, this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim. Second, the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not. To my mind, the killer who waits, watches, and conceals is no more worthy

of blame or sensitive to deterrence than the killer who attacks immediately and openly.

Further, I believe that the torture-murder special circumstance finding must also be vacated. Like the majority, I am of the opinion that the trial court erred by instructing the jury as it did: intent to torture—i.e., intent to inflict extreme physical pain—is an element of this special circumstance (*People v. Davenport* (1985) 41 Cal.3d 247, 260-271, 221 Cal.Rptr. 794, 710 P.2d 861); the court, however, failed to so instruct. But unlike the majority I cannot conclude the error was harmless. Having reviewed the record in its entirety, I am simply unable to declare a belief, beyond a reasonable doubt, that the jury would have found an intent to inflict extreme physical pain had they been properly instructed. The evidence is clear in showing that defendant intended to kill the victim: his use of the belt, the hammer, and the knife compels the conclusion. But the evidence is far from clear in revealing whether he intended to inflict extreme physical pain.

Indeed, on defendant's motion for new trial the trial court expressly found that there was "insufficient credible evidence" to support a finding that defendant intended to inflict extreme physical pain, and as a result vacated what it took to be the jury's implied verdict or finding of guilty of murder by torture. The court stated as follows.

"If somebody wants to cause torture he doesn't use a belt. That's the first thing the defendant did was try and strangle the victim with a belt. It was a rather clumsy attempt. The belt broke and so he went on to the hammer. And each

of the—each of the blows with a hammer it appears to me to be more consistent with an attempt to kill than an attempt to simply cause pain. They were all in the head area. Again, a clumsy attempt.

"He couldn't accomplish his objective with a hammer so then he eventually used the knife and finally rendered the victim dead with the knife.

"But we don't have any of these elements that we do in the other cases that support the intent element where we have wounds to an area of the body which would be nonfatal. And simply the statement that the defendant wanted to hurt the girl I don't think raises these clumsy attempts to kill to an indication of an intent to inflict pain separate and apart from the killing."

The majority assert that the jury impliedly found that defendant was guilty of murder by torture and hence impliedly found that he acted with intent to inflict extreme physical pain. The assertion is without basis. As the Attorney General himself argues, the jury made no finding, express or implied, on murder by torture: they merely found that the victim "was aware of extreme physical pain inflicted" by defendant. Such a finding, of course, implies neither a verdict of guilty of murder by torture in general nor a finding of intent to inflict extreme physical pain in particular.

The majority state: "we may conclude the jury necessarily or impliedly found a torture murder—otherwise there would have been no purpose in its special finding regarding the victim's awareness of the extreme physical pain inflicted by

defendant." (Maj. opn. at p. 84 of 257 Cal.Rptr., at p. __ of __ P.2d, *ante.)* They are wrong. The jury made the finding because the trial court directed them to expressly resolve the issue of awareness of extreme physical pain. And the trial court directed them to do so because it perceived "some problem with the language in the [standard] torture special circumstance instruction," and desired to preserve a finding of true—if such a finding was made—against invalidation on appeal.[2]

But even if the jury could be understood to have impliedly found that defendant intended to inflict extreme pain on the victim, its "finding" was vacated by the trial court. In deciding whether to set aside a verdict or finding on motion for new trial, the trial court "has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with [its] decision . . . unless there is a clear showing of an abuse of discretion." (*People v. Robarge* (1953) 41 Cal.2d 628, 633, 262 P.2d 14.) In this case the trial court plainly acted within the broad scope of its discretion and cannot be shown to have committed any abuse.

For the foregoing reasons, I would vacate the special circumstance findings and accordingly reverse the judgment of death as unsupported as a matter of law.

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2. The language the trial court found problematic was the following: "To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture." The court evidently believed that "pain" necessarily entailed *awareness of pain* on the part of the sufferer.

Appendix D

BROUSSARD, Justice, dissenting.

I dissent. Defendant made a prima facie showing that the system by which jury venires are selected in Ventura County produces venires which substantially underrepresent the Hispanic population of the community. In the absence of any rebuttal from the People demonstrating that the underrepresentation was legitimately caused, or served an important state interest, defendant's conviction must be reversed.

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (*Duren v. Missouri* (1979) 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579.)

Defendant made out a prima facie case under *Duren, supra*, 439 U.S. 357, 99 S.Ct. 664. He showed that a cognizable class, that is, Hispanics, made up 18.26 percent of the adult population of Ventura County, where he was tried. He showed significant underrepresentation in that in two consecutive venires, Hispanics made up only 10.71 and 8.73 percent of the venire. He showed systematic underrepresentation with statistical evidence that the underrepresentation was not a chance occurrence, but showed that the system of selection was not random. He suggested

that the fault in the system was with Ventura County's practice of inadequately enforcing its summons to jury service.

The majority find that defendant's sample was too small, and of too short duration, to establish the unrepresentativeness of the venire or the systematic nature of the exclusion. The majority speak as if the sample size is two, referring to the two venires. But for statistical purposes, the sample is defined by the number of jurors called. In the first week, 1,650 jurors were summoned, and in the second week, 1,950 jurors were summoned. The expert testimony was uncontroverted that these samples were large enough to provide a meaningful result.

Defendant's expert testified that persons with Spanish surnames accounted for 18.26 percent of the adult population of the county. Of the 364 who appeared for service on February 28, 1983, 39, or 10.71 percent, had Spanish surnames. Of the 424 persons reporting for service on March 7, only 37, or 8.73 percent, had Spanish surnames.

Another expert, a consulting actuary, explained the statistical significance of the numbers. The probability that out of 364 persons in the venire, only 39 would be Hispanic was 1 in 1,000. The probability that out of 424 persons in a venire, only 37 would be Hispanic, was 1 in 10,000. He explained the actual number of Hispanics appearing for the venire in the second sample was five standard deviations from what would occur in a random sample, and that using the standard reference text of normal distribution, the occurrence of five standard deviations from the normal has a probability of approximately one out of ten thousand. He concluded that

with respect to either sample, it would be extremely unlikely that the panels were drawn randomly. He found the two samples conclusive. "Having the two consecutive panels with such minute probabilities of occurring leads me to conclude that the sample is not randomly drawn." He then checked his conclusion by directing a computer to select 424 names from the total population in the same way that the county selected its weekly venire. He directed the computer to take a random sample of 424 names, 10,000 times. The smallest number of Spanish surnames that was ever drawn was 50.

Though the majority point to other cases in which more than two venires were sampled, they cite no authority, either legal or statistical, to establish that a survey of two large venires is inadequate to assess the operation of a jury selection system. The expert used the statistical decision method approved in other cases alleging unrepresentative jury venires (*see Alston v. Manson* (2d Cir.1986) 791 F.2d 255, 257-258, and cases cited; *see also Castaneda v. Partida* (1977) 430 U.S. 482, 494, fn. 13, 97 S.Ct. 1272, 1280, fn. 13, 51 L.Ed.2d 498), employment discrimination (*see Board of Education v. Califano* (2d Cir.1978) 584 F.2d 576, 584, fn. 29) and school segregation (*see Hazelwood School District v. United States* (1977) 433 U.S. 299, 308-309 & fn. 14, 97 S.Ct. 2736, 2742 & fn. 14, 53 L.Ed.2d 768). His statistical analysis showed results greater than the standard deviation from the norm.[1] In the absence of any evidence

1. The Supreme Court has explained the statistical model used here, and stated that in a sample of 870 prospective jurors, "[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three

(Cont'd)

that the expert was wrong to think that the evidence before him was adequate to support his conclusion, we have no ground to dispute that conclusion. Here, the two samples were large, and the probability was very low that Hispanics would be as underrepresented as they were. There was at most a one-in-a-thousand possibility that the underrepresentation was attributable to chance. This probability was so low, and the statistical method so well-established, that more should not be required.

The majority further reject defendant's claim on the ground that he has not shown systematic exclusion, the third prong of the *Duren* test. No general rule of law emerges from the majority opinion, but it does suggest that a defendant cannot make out a prima facie case under *Duren* if the jury selection system he complains of appears neutral on its face and his only evidence of systematic exclusion is that a cognizable group is significantly underrepresented. "[W]e believe that a prima facie case of systematic exclusion or underrepresentation of a distinctive class is not made merely by demonstrating that the county's race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw." (Maj. opn. at p. 73 of 257 Cal.Rptr., at p. 253 of 770 P.2d, italics in original.) Unless the defendant can demonstrate that the underrepresentation was "the immediate and direct result of the state's exemption laws" (*ibid.*), the majority suggest that

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(Cont'd)

standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 497, fn. 17, 97 S.Ct. at p. 1281, fn. 17.)

defendant has no ground for complaint. The implication is that defendant must show that the jury selection system is not neutral on its face, and that he must identify what aspect of the system caused the underrepresentation he complains of.

The Sixth Amendment establishes a defendant's right to be tried by a jury selected from a fair cross-section of the community (*Taylor v. Louisiana* (1975) 419 U.S. 522, 526-531, 95 S.Ct. 692, 695-698, 42 L.Ed.2d 690). The Fourteenth Amendment protects against *intentional* discrimination in the selection of venires (*Castaneda v. Partida, supra*, 430 U.S. 482, 492-494, 97 S.Ct. 1272, 1279-1280), but the Sixth Amendment protects against *unintentional* deviations from the constitutional standard. (*See Davis v. Zant* (11th Cir.1983) 721 F.2d. 1478, 1482 & fn. 6; *LaRoche v. Perrin* (1st Cir.1983) 718 F.2d 500, 503 (*overruled on other grounds in Barber v. Ponte* (1st Cir.1985) 772 F.2d 982); Barber v. Ponte, *supra*, 772 F.2d 982, 1004-1005, dis. opn. of Bownes, J., on rehg.) A defendant may make out a prima facie case that a facially neutral system of selection violates the Sixth Amendment, either by showing that subjectivity is allowed in executing the commands of the statute, and that venires are unrepresentative (*see Davis v. Zant, supra*, 721 F.2d 1478, 1482-1485), or simply by showing that the system has the unintended effect of causing a substantial underrepresentation of a particular group. (*People v. Harris* (1984) 36 Cal.3d 36, 58, 201 Cal.Rptr. 782, 679 P.2d 433, *cert. den. sub nom. California v. Harris* (1984) 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301; *People v. Buford* (1982) 132 Cal.App.3d 288, 295-296, 182 Cal.Rptr. 904; *see also United States v. Benmuhar* (1st Cir.1981) 658 F.2d 14, 19 [defendant made

out prima facie case that English proficiency requirement systematically excluded cognizable groups].)

The Sixth Amendment vindicates a democracy's interest in the participation of all groups in the administration of justice. (*Taylor v. Louisiana, supra,* 419 U.S. at p. 530, 95 S.Ct. at p. 697; *see Ballard v. United States* (1946) 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181; *see also Williams v. Florida* (1969) 399 U.S. 78, 100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446.) The protection against arbitrary or oppressive power "is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." (*Taylor v. Louisiana, supra,* 419 U.S. at p. 530, 95 S.Ct. at p. 698.) The fair cross-section requirement of the Sixth Amendment is substantive, not procedural. It is not satisfied by a facially neutral system which perpetuates the exclusion of disadvantaged groups from the mainstream of government.

Our nation's history is shadowed by too many examples of facially neutral rules which operated to exclude minority groups from their fundamental rights for us to be confident that a neutral law necessarily operates fairly. The poll tax (*Harman v. Forssenius* (1965) 380 U.S. 528, 543, 85 S.Ct. 1177, 1186, 14 L.Ed.2d 50), the literacy test (*Louisiana v.*

United States (1965) 380 U.S. 145, 150, 85 S.Ct. 817, 820, 13 L.Ed.2d 709), and gerrymandering (*Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110) are all apparently neutral methods by which access to the franchise has been unconstitutionally impaired. States have persistently used apparently neutral standards to exclude minorities from juries. (*Hernandez v. Texas* (1954) 347 U.S. 475, 478-479, 74 S.Ct. 667, 670-671, 98 L.Ed. 866; *Norris v. Alabama* (1935) 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074.) As early as 1886 the high court was called upon to invalidate an apparently neutral regulation which, as applied, invidiously discriminated against Chinese business people. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.) In the area of employment, apparently neutral employment requirements have been used to perpetuate long standing discrimination. (*See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 430-431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158.) It is no answer to a claim that juries are not drawn from a fair cross-section of the community to explain that the system under which the venires are selected is facially neutral.

Apparently the majority are not certain of their suggestion that a facially neutral system would never violate the Sixth Amendment, as they levy the additional charge against defendant that he cannot prove that the underrepresentation was caused by the system of selection. Defendant's expert evidence was that the probability of the underrepresentation occurring by chance in a random system was so small that it was established that something in the system of selection caused the underrepresentation. Implicit in *Duren* and also in Fourteenth Amendment cases is the

understanding that a significant disparity in representation which is not attributable to chance is attributable to the system of selection. (*Duren v. Missouri, supra,* 439 U.S. at p. 366, 99 S.Ct. at p. 669; *see also Castaneda v. Partida, supra,* 430 U.S. at p. 494, fn. 13, 97 S.Ct. at p. 1272, fn. 13; *United States v. Benmuhar, supra,* 658 F.2d at p. 19; *Smith v. Yeager* (3d Cir.1972) 465 F.2d 272, 280, *cert. den.* 409 U.S. 1076, 93 S.Ct. 685, 34 L.Ed.2d 665.) The same logic applies in employment discrimination cases. (*Teamsters v. United States* (1977) 431 U.S. 324, 337-340, 97 S.Ct. 1843, 1855-1857, 52 L.Ed.2d 396; *see also Hazelwood School District v. United States, supra,* 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741-2742.)

The United States Supreme Court has made it clear that in cases in which defendant seeks to show that the jury selection system violates the Fourteenth Amendment, underrepresentation of a cognizable class is evidence of both discriminatory effect and discriminatory purpose. "In contrast, in Sixth Amendment fair-cross-section cases, *systematic disproportion itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (*Duren v. Missouri, supra,* 439 U.S. at p. 368, fn. 26, 99 S.Ct. at p. 670, fn. 26, italics added.)

Nor is it defendant's obligation in establishing the prima facie case to show at exactly what point in the system the disparity occurs. It is suggested that because defendant in *Duren* could point to the stage in the jury selection process when women became underrepresented, *Duren* requires

defendant to show exactly what caused the under-representation. Not so—in *Duren* itself, the court rejected the idea that defendant had to show that the underrepresentation was not caused by jurors seeking exemptions under provisions which were not subject to attack. (*Duren v. Missouri, supra*, 439 U.S. at pp. 368-369, 99 S.Ct. at pp. 670-671.)

Next, the majority suggest that Ventura County is doing all it reasonably can to assure a fair cross-section. (Maj. opn. at p. 75 of 257 Cal.Rptr., at p. 255 of 770 P.2d.) The People called a supervisor in the jury commissioner's office who testified that requests for disqualification, exemption or excuse are acted upon by clerks in the jury commissioner's office who make no systematic effort to investigate or verify claims. If a person fails to return the questionnaire and fails to appear for jury service, the jury commissioner's office mails a letter and form soliciting a request for excuse or postponement of service. There is no further effort made to secure the prospective juror's compliance with the summons. The county essentially operates on the honor system. *Of those called during the two weeks studied by defendant, less than a third appeared.* When so few actually appear for service, and so little effort is made to verify the excuses of the vast majority who do not appear, the county can hardly claim that it is doing all that can be done.

The Sixth Amendment right to a jury venire drawn from a fair cross-section of the community is an important one. It serves the goal of fairness to the individual defendant, as well as the broader, democratic goal of assuring the participation of the whole community in the judicial branch

of government. Our history warns us against complacency in assuming that these goals will be reached. When social science demonstrates that in fact, our jury venires are not representative of a fair cross-section of the community, we must reexamine the system of selection for flaws.

I would reverse the judgment.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 1, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-99020

D.C. No. CV-91-00682-DT
Central District of California, Los Angeles

MICHAEL ANGELO MORALES,

Petitioner - Appellant,

v.—

ARTHUR CALDERON, Warden, as Warden of San Quentin State Prison,

Respondent - Appellee.

ORDER

Before: FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges.

The majority of the panel has voted to deny the petition for rehearing. Judge Kleinfeld has voted to deny the petition for rehearing en banc, and Judge Fernandez has recommended the same. Judge McKeown has voted to grant the petition for rehearing en banc.

Appendix E

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en bane. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F – RELEVANT STATUTES

28 U.S.C. §§ 2253-2254

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under *section 2255* before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under *section 2255*.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Appendix F

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct

copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by *section 3006A of title 18*.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Appendix F

Cal. Penal Code Pt. 190 (Mathew Bender 1983) (selected sections)

§ 190. Punishment for Murder.

Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

§ 190.1. Separate Phases of Trial for Death Penalty Case.

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior

proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of special circumstance.

§ 190.2. Special Circumstances for Imposition of Death Penalty or Life Without Parole.

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

* * * *

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily tortuous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

* * * *

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

Appendix F

(i) Robbery in violation of Section 211.

* * * *

(iii) Rape in violation of Section 261.

* * * *

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

§ 190.3. Determining Whether Death Penalty or Life Without Parole is Penalty – Factors to Consider.

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the

defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed,

be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Appendix F

§ 190.4. Cases Under § 190.2 – Procedure.

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

* * * *

(2)

No. 05-23

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ANGELO MORALES, *Petitioner and Appellant,*

v.

JILL L. BROWN, *Respondent and Appellee.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. When a federal court considers whether to issue a certificate of appealability under the AEDPA, is it required to evaluate circuit splits of authority in determining whether a petitioner has made a substantial showing of the denial of a constitutional right?

2. Does California's lying-in-wait special circumstance classification genuinely narrow the class of death-eligible murders as required under the Eighth Amendment of the Constitution?

3. When a federal court finds on federal habeas review that a state court's application of the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), is erroneous, does the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 507 U.S. 619 (1993) apply?

4. In a capital weighing state, when a federal court finds an invalid aggravating circumstance, and further finds erroneous a state court's application of the harmless error standard in *Chapman v. California*, 386 U.S. 18 (1967), should the federal court remand the case back to the state court for reweighing?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-23

MICHAEL ANGELO MORALES, *Petitioner and Appellant,*

v.

JILL L. BROWN, *Respondent and Appellee.*

STATEMENT OF THE CASE

Almost 25 years ago, petitioner and his cousin conspired to murder a young and beautiful teenage girl named Terri Lynn Winchell. In what all members of the three-judge panel decision in this case agree was "an entirely gratuitous and terribly vicious murder" and rape, petitioner and his cousin, through a ruse, lured Ms. Winchell into a car and drove her to a remote area of San Joaquin County, California. There, petitioner caught Terri Winchell unawares and attacked her from behind using a belt to attempt strangle her, and then a hammer to beat her into unconsciousness in a frenzied attack. Petitioner then dragged Ms. Winchell from the car into a grape vineyard where he raped her, and then stabbed her to death. Petitioner then went home, told his girlfriend and housemate what he had done, washed off the knife and hammer, and cleaned the car. He then went out and bought himself some beer.

On April 6, 1983, a California Superior Court jury convicted petitioner of conspiracy to commit murder, rape, and first degree intentional murder. The jury further found true two special circumstance allegations that petitioner committed the

murder while lying-in-wait, and by means of torture, and one personal use of a knife allegation. After a penalty phase, the jury returned a death sentence.

On appeal, the California Supreme Court affirmed the judgment of conviction and sentence of death, but vacated a "judgment n.o.v." as to the torture-murder theory of guilt. *People v. Morales*, 48 Cal.3d 527, 770 P.2d 244 (1988). This Court denied a petition for writ of certiorari. *Morales v. California*, 493 U.S. 984 (1989).

On January 14, 1994, petitioner filed a first amended petition for writ of habeas corpus, and the district court granted respondent's procedural bar motion to dismiss. The Ninth Circuit reversed. *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). This Court denied respondent's petition for writ of certiorari. *Calderon v. Morales*, 519 U.S. 1001 (1996).

On April 19, 1999, the district court issued its judgment denying the petition for writ of habeas corpus. On June 14, 1999, the district court denied petitioner's motion to alter or amend the judgment. The district court also granted petitioner a certificate of probable cause to appeal.

In an opinion that was filed on July 28, 2003, and later amended to add a dissent on October 21, 2004, the Ninth Circuit affirmed the district court's judgment denying the petition for writ of habeas corpus. In so doing, the court granted a certificate of appealability (COA) as to five claims. The court denied a certificate as to all remaining claims, including 22 claims that were undeveloped and raised in footnotes throughout petitioner's opening brief on appeal. (Cert. Pet., App. A.) On October 14, 2003, petitioner filed a petition for rehearing and rehearing en banc. On March 1, 2005, the petition for rehearing and rehearing en banc was denied. (Cert. Pet., App. E. at 170a-71a.) On June 29, 2005, petitioner filed a petition for writ of certiorari in this Court.